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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

Nos. 122, 123, 124, 125

THE IVANHOE IRRIGATION DISTRICT,
Plaintiff and Appellant,
vs.
ALL PARTIES AND PERSONS, etc.,
Defendants,
THE STATE OF CALIFORNIA,
Defendant and Appellant,
COURTNEY McCRACKEN,
Defendant and Appellee.
No. 122

THE MADERA IRRIGATION DISTRICT,
Plaintiff and Appellant,
vs.
ALL PERSONS, etc.,
Defendants,
THE STATE OF CALIFORNIA,
Defendant and Appellant,
CARL F. STEINER, et al.,
Defendants and Appellees.
No. 123

THE MADERA IRRIGATION DISTRICT,
Defendant and Appellant,
vs.
PHILLIP and JANE E. ALBONICO,
Plaintiffs and Appellees.
No. 124

THE SANTA BARBARA COUNTY WATER AGENCY,
Plaintiff and Appellant,
vs.
ALL PARTIES AND PERSONS, etc.,
Defendants,
MAURICE A. BALAAM, et al.,
Defendants and Appellees.
No. 125

Appeals from the Supreme Court of California.

APPELLANTS' OPENING BRIEF.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
I. There is no procedural obstacle to jurisdiction	4
II. The validation proceedings required by Federal law are cases or controversies within the meaning of Article III of the Constitution	5
Statutes involved	8
Questions presented	9
Statement of the cases	13
I. The cases and the contracts	13
II. The reasoning of the California court	17
Summary of the argument	20
Argument	28
I. The decisions rest solely on Federal grounds	28
A. The possible State grounds of invalidity were rejected by the California court	29
B. Only Federal grounds are common to the Ivanhoe and Santa Barbara cases	29
C. The grounds of invalidity are all Federal	31
1. Invalidity of Federal laws	32
2. If the Federal laws were valid the contracts would be valid	33
3. Invalidity of the contracts under Federal law	35
4. Invalidity of the contracts because of possible interpretations	37
D. Inter-action of State and Federal laws raises Federal questions	38
II. These cases are properly appealable	39

Page

III. The water delivery restrictions are valid 43

A. Federal law requires inclusion of the acreage limitation in these contracts 43

1. The plain language of Section 46 requires the limitation 43

2. Section 46 continues the original and general policy 45

3. The general policy applies unless expressly altered by Congress 47

4. Congress has refused to adopt a special policy for the Central Valley project 49

B. The 160 acre water limitation is a constitutional means of achieving wide distribution of the Federal subsidy involved in the delivery of irrigation water from Federal reclamation projects 52

1. The constitutional justification for the limitation 52

2. Analysis of the California court's holding of invalidity 54

3. The sole justification for existence of the trust in water of the State announced by the California court is to invalidate the limitation 56

4. The effect of Section 8 of the Reclamation Act of 1902 on the power of the United States to apply the limitation and obtain the necessary water rights 57

5. The limitation does not deprive owners of excess land of any inchoate beneficial water rights owned by them without due process of law and does not deny them the equal protection of the laws 61

6. Section 46 of the Omnibus Adjustment Act of 1926 is an "applicable" and "relevant" Act of Congress under California Water Code Sections 23197(a) and 23200 63

Page

IV. The provisions of the contracts relating to water delivery and payment are valid 66

A. These provisions conform literally with Federal law 66

B. Analysis of the objections of the California court to the water delivery and payment provisions 71

C. Federal law does not require that a water supply contract under Section 9(e) of the Reclamation Project Act of 1939 contain a construction obligation for repayment by the district in 40 years 72

D. Federal law is not violated by the fact that the water delivery provisions of the contracts may not be in conformance with State laws and regulations concerning the control of public utilities 79

E. The water delivery provisions of the contracts do not reserve to the United States the right arbitrarily to discontinue water delivery at the end of the contract term 82

V. The provision of the contracts respecting title to works is valid 86

Conclusion 91

Index to Appendix

Appendix A

Page

Reclamation Act of 1902 (32 Stat. 388) 93

Appendix B

Omnibus Adjustment Act of 1926 (44 Stat. 636) 95

Appendix C

Act of August 26, 1937 (50 Stat. 844) 97

Appendix D

Reclamation Project Act of 1939 (53 Stat. 1187) 99

Appendix E

Act of July 2, 1956 (70 Stat. 483, 43 U. S. C. A. sec. 485h-1 (1956 Supp.)) 105

Appendix F

California Irrigation District Federal Cooperation Law (California Water Code, Division 11, Part 6, Chapter 2) 109

Appendix G

Santa Barbara County Water Agency Act (Calif. Stats. 1945, ch. 1501, p. 2780, as amended by Calif. Stats. 1949, ch. 12, p. 24, 1 Deering's Calif. Water Code Ann., Act 7303 (1954), West Calif. Water Code App. §§51-6, 51-6.3, and 51-11.10) 113

Appendix H

California Water Code Section 22250 117

Appendix I

California Water Code, Division 11, Part 5, Chapter 4 118

Table of Authorities Cited

Cases*			Pages
Albonico v. Madera Irr. Dist.:			
47 Cal.2d 695,	306 P.2d 894,	AJS 180	2
47 Cal.2d 697-698,	306 P.2d 896,	AJS 183	14, 16, 29
Allen v. Railroad Commission:			
179 Cal. 68, 175 P. 466 (1918)			24
Central Irrigation District, In re:			
117 Cal. 382, 49 P. 354 (1897)			6
Federal Power Commission v. Niagara Mohawk Power Corp.:			
347 U.S. 239 (1954)			25
Federal Power Commission v. Oregon:			
349 U.S. 435 (1955)			20, 24
Fidelity National Bank v. Swope:			
274 U.S. 123 (1927)			6, 7
Flournoy v. Wiener:			
321 U.S. 253 (1944)			3, 38, 39
Henkel v. United States:			
237 U.S. 43 (1915)			22
Hollywood C. of C. v. Railroad Comm.:			
192 Cal. 307, 219 P. 983 (1923)			24
Hopkins Savings Ass'n v. Cleary:			
296 U.S. 315 (1935)			40
Hurley v. Kincaid:			
285 U.S. 95 (1932)			22
Ivanhoe Irr. Dist. v. All Parties:			
47 Cal.2d 597,	306 P.2d 824,	AJS 1	2
47 Cal.2d 606-607,	306 P.2d 829,	AJS 2	7
47 Cal.2d 618-619,	306 P.2d 836,	AJS 19-21	21
47 Cal.2d 620,	306 P.2d 837,	AJS 22	34
47 Cal.2d 623,	306 P.2d 839,	AJS 27	21
47 Cal.2d 625,	306 P.2d 840,	AJS 30	54

*The abbreviation AJS refers to the Appendices to the Jurisdictional Statement. The Ivanhoe, Madera, Albonico and Santa Barbara opinions of the California Supreme Court have not been reprinted in the Record (R. iii, iv, v), but are reprinted in the Appendices to the Jurisdictional Statement.

Ivanhoe Irr. Dist. v. All Parties:			Pages
47 Cal.2d 625,	306 P.2d 841,	AJS 30	19
47 Cal.2d 626,	306 P.2d 841,	AJS 31	55, 56
47 Cal.2d 626,	306 P.2d 842,	AJS 31-32	19
47 Cal.2d 626,	306 P.2d 841,	AJS 32	55
47 Cal.2d 627,	306 P.2d 841,	AJS 32-33	56
47 Cal.2d 627,	306 P.2d 841,	AJS 33	19, 56
47 Cal.2d 627-628,	306 P.2d 842,	AJS 33-34	58
47 Cal.2d 627-628,	306 P.2d 841-842,	AJS 33-35	19
47 Cal.2d 627-628,	306 P.2d 842,	AJS 33-35	58
47 Cal.2d 628,	306 P.2d 842,	AJS 34	58
47 Cal.2d 628,	306 P.2d 842,	AJS 35	19, 58
47 Cal.2d 628-629,	306 P.2d 842-843,	AJS 35	55
47 Cal.2d 630,	306 P.2d 843,	AJS 37-38	28, 32
47 Cal.2d 630,	306 P.2d 843-844,	AJS 38	29
47 Cal.2d 630-631,	306 P.2d 843-844,	AJS 38	71
47 Cal.2d 630-631,	306 P.2d 844,	AJS 38-39	18
47 Cal.2d 630-631,	306 P.2d 844,	AJS 38-40	11
47 Cal.2d 631,	306 P.2d 844,	AJS 38-40	19, 33 n. 4
47 Cal.2d 631,	306 P.2d 844,	AJS 39	86, 87
47 Cal.2d 631,	306 P.2d 844,	AJS 39-40	87
47 Cal.2d 631,	306 P.2d 844,	AJS 40	11
47 Cal.2d 632,	306 P.2d 845,	AJS 40-41	41
47 Cal.2d 636,	306 P.2d 847,	AJS 46	19
47 Cal.2d 636,	306 P.2d 847,	AJS 46-47	30, 65
47 Cal.2d 636-638,	306 P.2d 847-848,	AJS 46-49	56
47 Cal.2d 636-639,	306 P.2d 847-849,	AJS 46-49	18
47 Cal.2d 636,	306 P.2d 847,	AJS 47	10, 34
47 Cal.2d 637,	306 P.2d 848,	AJS 47	21
47 Cal.2d 637,	306 P.2d 848,	AJS 48	19, 55
47 Cal.2d 637-638,	306 P.2d 848,	AJS 48	10
47 Cal.2d 638,	306 P.2d 848,	AJS 49	10
47 Cal.2d 638,	306 P.2d 848-849,	AJS 50	41
47 Cal.2d 638,	306 P.2d 849,	AJS 50	41
47 Cal.2d 638-639,	306 P.2d 849,	AJS 50	9, 18, 41
47 Cal.2d 639,	306 P.2d 849,	AJS 50-51	10, 55
47 Cal.2d 639,	306 P.2d 849,	AJS 51	10, 33, 34, 55, 56, 58, 64
47 Cal.2d 639-640,	306 P.2d 849,	AJS 52	86
47 Cal.2d 639-640,	306 P.2d 849-850,	AJS 52	71
47 Cal.2d 640,	306 P.2d 849,	AJS 52	18, 19, 33 n. 4

Ivanhoe Irr. Dist. v. All Parties:			Pages
47 Cal.2d 640,	306 P.2d 849-850,	AJS 52	11, 35, 72
47 Cal.2d 641,	306 P.2d 850,	AJS 54	12
47 Cal.2d 641-642,	306 P.2d 851,	AJS 54-56	72
47 Cal.2d 641-643,	306 P.2d 850-851,	AJS 54-56	20
47 Cal.2d 642,	306 P.2d 851,	AJS 55	36
47 Cal.2d 642,	306 P.2d 851,	AJS 55-56	11, 18, 36, 79-80, 81
47 Cal.2d 642-643,	306 P.2d 851,	AJS 56	18
47 Cal.2d 643,	306 P.2d 851,	AJS 56	12, 13, 37, 72, 82
47 Cal. 2d 644,	306 P.2d 852,	AJS 58-59	72
47 Cal.2d 644,	306 P.2d 852,	AJS 59	81
47 Cal.2d 645,	306 P.2d 853,	AJS 59	10, 18
47 Cal.2d 646-647,	306 P.2d 854,	AJS 62	17, 29
47 Cal.2d 647-648,	306 P.2d 854,	AJS 63	11
47 Cal.2d 648,	306 P.2d 854,	AJS 63	86
47 Cal.2d 648,	306 P.2d 854,	AJS 63-64	19
47 Cal.2d 648,	306 P.2d 854-855,	AJS 64	37, 72
47 Cal.2d 658,	306 P.2d 861,	AJS 78-79	52
47 Cal.2d 658,	306 P.2d 861,	AJS 79	54, 60
47 Cal.2d 658,	306 P.2d 861,	AJS 79-80	52
47 Cal.2d 662,	306 P.2d 864,	AJS 85-86	88

Jett Bros. Co. v. City of Carrolton:
252 U.S. 1 (1920) 39

Kalb v. Feuerstein:
308 U.S. 433 (1940) 40

Lawrence v. State Tax Comm.:
286 U.S. 276 (1932) 82

Madera Irr. Dist. v. All Persons:			
47 Cal.2d 681,	306 P.2d 886,	AJS 139	2
47 Cal. 2d 686,	306 P.2d 889,	AJS 143	83
47 Cal. 2d 687,	306 P.2d 890,	AJS 145	29
47 Cal.2d 687-688,	306 P.2d 890,	AJS 145	40
47 Cal.2d 688,	306 P.2d 890,	AJS 145	37, 56, 71, 72, 82
47 Cal.2d 688-689,	306 P.2d 890,	AJS 146	57

Madera Irr. Dist. v. All Persons: Pages
47 Cal.2d 691, 306 P.2d 892, AJS 150-151 57
47 Cal.2d 692-693, 306 P.2d 893, AJS 152 57
47 Cal.2d 693-694, 306 P.2d 893-894, AJS 153-154 ....17, 29
47 Cal.2d 694, 306 P.2d 894, AJS 154 .....14, 29

Market Street R. Co. v. Comm.:
324 U.S. 548 (1945) 5

Monongahela Navigation Co. v. United States:
148 U.S. 312 (1893) 27

Nebraska v. Wyoming:
325 U.S. 589 (1945) 24, 60, 80

New York v. United States:
326 U.S. 572 (1946) 84

People v. Linda Vista Irr. Dist.:
128 Cal. 477, 61 P. 86 (1900) 7

Petrie v. Nampa etc. Irrig. Dist.:
248 U.S. 154 (1918) 6

Red Cross Line v. Atlantic Fruit Co.:
264 U.S. 109 (1924) 40

Santa Barbara County Water Agency v. All Persons:
47 Cal.2d 699, 306 P.2d 875, AJS 205 2
47 Cal.2d 703, 306 P.2d 878, AJS 206 7
47 Cal.2d 707-713, 306 P.2d 880-884, AJS 211-221.... 29
47 Cal.2d 711-713, 306 P.2d 883-884, AJS 218-221 57
47 Cal.2d 713, 306 P.2d 884, AJS 221..12, 14, 17, 29, 31, 37, 40, 82
47 Cal.2d 713-714, 306 P.2d 884, AJS 222 .....17, 29

Smith v. Kansas City Title & Trust Co.:
255 U.S. 180 (1921) 38

S. R. A., Inc. v. Minnesota:
327 U.S. 558 (1946) 37, 83

Standard Oil of California v. Johnson:
316 U.S. 481 (1942) 38

Stephan v. United States:

Steward Machine Co. v. Davis: Pages
301 U.S. 548 (1937) 63

Sweezy v. New Hampshire:
354 U.S. 234 (1957) 3

Tregea v. Modesto Irr. Dist.:
164 U.S. 179 (1896) 6

Tulare Irr. Dist. v. Shepard:
185 U.S. 1 (1902) 6

United States v. Appalachian Power Co.:
311 U.S. 377 (1940) 20, 84

United States v. Buffalo Pitts Co.:
234 U.S. 228 (1914) 22

United States v. Carmack:
329 U.S. 230 (1946) 22, 60

United States v. Gerlach Live Stock Co.:
339 U.S. 725 (1950) 22, 24-25, 43, 52, 58, 59

United States v. Willow River Co.:
324 U.S. 499 (1945) 62

Warner v. Goltra:
293 U.S. 155 (1934) 42

Wehrle v. W. & P. Commrs.:
211 Cal. 70, 293 P. 67 (1930) 30

West Virginia v. Sims:
341 U.S. 22 (1951) 27, 30, 83

Wickard v. Filburn:
317 U.S. 111 (1942) 62, 63

Wilson v. Cook:
327 U.S. 474 (1946) 34, 37, 38

Wissner v. Wissner:
338 U.S. 655 (1950) 40

Worcester Nat. Bank, Ex Parte:
279 U.S. 347 (1929) 40

Yearsley v. Ross:

Statutes of the United States Pages

1912, Aug. 9, § 3, 37 Stat. 266, 43 U.S.C. § 544 46
1914, Aug. 13, § 12, 38 Stat. 689, 43 U.S.C. § 418 ..... 46, 47
1937, May 27, § 1, 50 Stat. 208 47
1937, Aug. 26, § 2, 50 Stat. 850 ..... 8, 21, 43, 49, 59, 97-98
1938, June 16, § 1, 52 Stat. 764, 43 U.S.C. § 386 48
1940, Nov. 29, § 1, 54 Stat. 1219 48
1943, March 10, § 2, 57 Stat. 14, 16 U.S.C. § 835a 47
1949, Oct. 14, § 2, 63 Stat. 852 79
1950, Sept. 26, § 2, 64 Stat. 1036 79
1952, June 27, § 1, 66 Stat. 282 47
1954, Aug. 28, § 1, 68 Stat. 890 48
1954, Sept. 3, § 1, 68 Stat. 1190 48
1955, Aug. 12, § 1, 69 Stat. 719 79
1956, July 2, 70 Stat. 483, 43 U.S.C.A. § 485 h-1 (1956 supp.) 8, 66-67, 68, 73, 81, 105-108
§ 1(1) 77, 85
§ 1(2) 77, 85
§ 1(3) 78, 81
§ 1(4) 85
§ 1(6) 81
§ 2 85
1956, Aug. 1, § 2(b), 70 Stat. 777 47
1956, Aug. 6, § 5(c), 70 Stat. 1046 47
1957, July 24, 71 Stat. 309 47
1957, Sept. 2, 71 Stat. 590 47
1957, Sept. 4, 71 Stat. 608 47
Boulder Canyon Project Act of 1928, 45 Stat. 1057, 43 U.S.C. §§ 617-617t 48
§ 6, 45 Stat. 1061, 43 U.S.C. § 617e 48
Interior Department Appropriation Act of 1927, 44 Stat. 479 ..... 47, 66

Omnibus Adjustment Act of 1926: Pages
§ 45, 44 Stat. 648, 43 U.S.C. § 423(d) 66
§ 46, 44 Stat. 649, 43 U.S.C. § 423(e) ..3, 5, 8, 9, 14, 16, 18, 25, 32, 34, 40, 43,44, 45, 55, 56, 63, 64, 66, 95-96
§ 48, 44 Stat. 650, 43 U.S.C. § 423(f) 41

Reclamation Act of 1902:
§ 4, 32 Stat. 389, 43 U.S.C. § 461 66
§ 5, 32 Stat. 389, 43 U.S.C. § 431 .....8, 45, 93
§ 6, 32 Stat. 389, 43 U.S.C. § 498 ....8, 16, 19, 26, 88, 93-94
§ 7, 32 Stat. 389, 43 U.S.C. § 421 .....22, 59
§ 8, 32 Stat. 390, 43 U.S.C. §§ 372, 383 ..3, 8, 10, 11, 12, 19, 24, 36, 55, 58, 72, 80, 94
§ 10, 32 Stat. 390, 43 U.S.C. § 373 .....22, 59

Reclamation Extension Act of 1914, §§ 1, 2, 38 Stat. 686-687, 43 U.S.C. §§ 471, 472, 475 66

Reclamation Project Act of 1939:
§ 9(a), 53 Stat. 1194, 43 U.S.C. § 485 h (a) 21, 43
§ 9(c), 53 Stat. 1194, 43 U.S.C. § 485 h (c) ...3, 8, 12, 13,14, 25, 70, 71 n. 5, 99-100
§ 9(d), 53 Stat. 1195, 43 U.S.C. § 485 h (d) 8, 66, 67, 100-103
§ 9(e), 53 Stat. 1196, 43 U.S.C. § 485 h (e) ...3, 8, 11, 12, 14, 25, 32, 66, 67, 71 n. 5, 72, 103-104
§ 14, 53 Stat. 1197, 43 U.S.C. § 389 59

Second Deficiency Act of 1924, § 4 (F), 43 Stat. 702, 43 U.S.C. §§ 473, 474 66

Warren Act of 1911:
§ 1, 36 Stat. 925, 43 U.S.C. § 523 45-46
§ 2, 36 Stat. 926, 43 U.S.C. § 524 46

United States Code, Title 28:
§ 1257(1) 3, 39
§ 1346(a)(2) 60
§ 1491 60
§ 2101(c) 4
§ 2103 3

Statutes of California

Civil Code: Pag
§ 1643 .....
§ 3541 .....

Constitution, Art. XI, § 8 .....

Santa Barbara County Water Agency Act, Calif. Stat. 1945, c. 1501, p. 2780, as amended by Calif. Stats. 1949, c. 12, p. 18; 1 Deering's California Water Code Ann., Act 7303, West Calif. Water Code, Appendix 51 .....9, 113-1
§ 6 .....3, 10, 16, 36,
§ 6.3 10,
§ 10 .....
§ 10.1 .....
§ 11.10 .....

Water Code:
§ 22250 .....9, 30, 34, 65, 1
§§ 22670-22684 .....5, 9, 118-1
§§ 23175-23197 .....8, 63, 109-1
§ 23195 .....3, 10, 16, 38,
§§ 23195 et seq. .....
§ 23196 (b) 36,
§ 23196 (g) .....
§ 23197 .....3, 16,
§ 23197 (a) 10, 63, 64,
§ 23200 .....3, 8, 10, 16, 38, 56, 63, 63-64, 64, 65, 1
§ 23225 .....5, 8, 111-1
§§ 30000 et seq. .....
§ 31023 .....
§ 31025 .....
§ 31701 .....

Supreme Court Rules

Rule 11, par. 1 .....
Rule 16, par. 4 .....
Rule 40, par. (b) .....

Legislative Materials

	Pages
81 Cong. Rec. 3905, 4509, 4516, 4540, 4548, 4561, 6704 (1937)	49
H.R. 3961, 78th Cong. 2d Sess.	50
H.R. Doc. No. 146, 80th Cong. 1st Sess. (1947) (Central Valley Project):	
p. 5	69
pp. 9-10	69
pp. 12-14	52
pp. 17-22	69
H.R. Doc. No. 587, 80th Cong. 2d Sess. (1948) (Santa Barbara Project)	43
p. 22	69
pp. 30-32	52
pp. 33-34	69
pp. 78-79	13
Hearings before House Committee on Appropriations on H.R. 6958, 75 Cong. 1st Sess. 1597 (1937)	50
H.R. Rep. No. 1754, 84 Cong. 2d Sess. (1956):	
p. 2	73-75
p. 6	78
H.R. Report. Special Subcommittee on Irrigation and Reclamation 111-112 (1952)	27
S. 2217, 84th Cong. 2nd Sess. (1956)	88
S. 413, 85th Cong. 1st Sess. (1957)	90
Hearings before Senate Committee on Commerce on H.R. 3961, 78th Cong., 2d Sess. (1944)	51
Hearings before Subcommittee of Senate Committee on Public Lands on S. 912, 80th Cong., 1st Sess. (1947)	51
Sen. Rep. No. 2241, 84th Cong., 2d Sess. 2 (1956)	75-77
Sen. Rep. No. 2379, 84th Cong., 2d Sess. 2 (1956)	89
Sen. Rep. No. 291, 85th Cong., 1st Sess. 2 (1957)	90

Official Letters, Opinions and Reports

Pages

Letter, Hon. Ray Lyman Wilbur to Imperial Irrigation District, Feb. 24, 1933 48

Opinions, Solicitor of the Department of the Interior:
M-33902, May 31, 1945 49
M-35047, May 24, 1948 68

Adams, Irrigation Districts in California (State of Calif., Division of Engineering, etc., Bull. No. 21) 199-203 (1929) 14

California Districts Securities Commission, Report 1954-55 (1956) pp. 30-31 27
p. 31 ..... 15 n.2

Montgomery and Clawson, History of Legislation and Policy Formation of the Central Valley Project (U.S. Dept. of Agric., Bur. of Agric. Econ. 1946):
pp. 133-136 49
p. 171 79

Law Reviews and Text

Note, Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference, 66 Harv. L. Rev. 1498, 1502 (1953) 38

Taylor, Destruction of Federal Reclamation Policy? The Ivanhoe Case, 10 Stanf. L. Rev. 76 (1957):
pp. 92-96 ..... 52-53, 62
pp. 100 et ff. 45

3 Williston, Contracts, § 620, pp. 1785-6 (Rev'd ed. 1936) .. 83

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THE MADERA IRRIGATION DISTRICT, *Plaintiff and Appellant,* vs. ALL PERSONS, etc., *Defendants,* THE STATE OF CALIFORNIA, *Defendant and Appellant,* CARL F. STEINER, et al., *Defendants and Appellees.*	No. 123
THE MADERA IRRIGATION DISTRICT, *Defendant and Appellant,* vs. PHILLIP and JANE E. ALBONICO, *Plaintiffs and Appellees.*	No. 124
THE SANTA BARBARA COUNTY WATER AGENCY, *Plaintiff and Appellant,* vs. ALL PARTIES AND PERSONS, etc., *Defendants,* MAURICE A. BALAAM, et al., *Defendants and Appellees.*	No. 125

Appeals from the Supreme Court of California.

APPELLANTS' OPENING BRIEF.

These are appeals from four companion decisio of the California Supreme Court holding fede

statutes invalid. Pursuant to these holdings that court invalidated three contracts concerning the delivery of water from two federal reclamation projects in California to public agencies of this state. The questions involved in these four appeals are closely related. This court has ordered the cases consolidated for argument (R. 656). Hence, this one brief is being submitted by appellants for all four cases.

OPINIONS BELOW.

The opinions of the California Supreme Court are reported as follows:[1]

Case No. 122, *Ivanhoe Irr. Dist. v. All Parties*, 47 Cal.2d 597, 306 P.2d 824, AJS 1;

Case No. 123, *Madera Irr. Dist. v. All Persons*, 47 Cal.2d 681, 306 P.2d 886, AJS 139;

Case No. 124, *Albonico v. Madera Irr. Dist.*, 47 Cal.2d 695, 306 P.2d 894, AJS 180;

Case No. 125, *Santa Barbara County Water Agency v. All Persons*, 47 Cal.2d 699, 306 P.2d 875, AJS 205.

JURISDICTION.

By its order of October 14, 1957, this court postponed consideration of the question of jurisdiction to the hearing of these cases on their merits. Jurisdic-

[1]These opinions are reprinted in the Appendices to Jurisdictional Statement. References to the pages of this reprint are included with the citations of the opinions in this brief and are designated thus: AJS.

tion will, therefore, be discussed at the outset of this brief (Rule 16, par. 4; cf. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

These four appeals are taken pursuant to 28 U.S.C. § 1257 (1) on the ground that in each case the validity of statutes of the United States has been drawn in question and the decisions are against their validity.

Presented with the appealable issues are a number of reviewable issues not in themselves appealable (*Flournoy v. Wiener*, 321 U.S. 253, 263 (1944)). If the court should find that there are no appealable issues, the reviewable issues may nevertheless be considered as on certiorari (28 U.S.C. § 2103).

The appealable issues are the validity of section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. § 423(e)), and sections 9(c) and 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1194, 1196, 43 U.S.C. §§ 485 h(c), 485 h(e)).

The reviewable questions, not capable by themselves of being brought to this court by appeal, are the interpretation of the above sections; the interpretation of section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§ 372, 383); the interpretation of state law as applied to the United States because of the reference to state law in section 8; and the interpretation of federal law as applied to state agencies because of the references to federal law in California Water Code sections 23195, 23197 and 23200 and section 6 of the Santa Barbara County Water Agency Act (Calif. Stats. 1945, c. 1501, p. 2787).

The possible jurisdictional problems are as follows:

1. Is there any procedural obstacle to assuming jurisdiction?

2. Do the three cases which are special validation proceedings, i.e., *Ivanhoe, Madera* and *Santa Barbara*, present cases or controversies within the meaning of Article III of the Constitution?

3. Do the decisions below rest on an adequate or, indeed, any non-federal basis?

4. Which is the proper remedy, appeal or certiorari?

Each of these questions should be answered in favor of the conclusion that the jurisdiction of this court on appeal has been properly invoked. The discussion of the third and fourth questions depends on a consideration as a whole of the opinions of the California court. It has therefore been postponed until after the statement of the cases (pp. 28 to 42 herein). But the discussion of the first two questions is brief and uncomplicated. It follows immediately.

I. THERE IS NO PROCEDURAL OBSTACLE TO JURISDICTION.

"The time factors upon which jurisdiction rests" have been met (Rule 40, par. (b)):

The notices of appeal in each of these cases were filed within the ninety days allowed (28 U.S.C. § 2101 (c); Rule 11, par. 1). The decisions of the California Supreme Court in each of the cases were filed on

January 24, 1957. Rehearings were denied in each on February 19, 1957, and the judgments thereby became final (*Market Street R. Co. v. Comm'n.*, 324 U.S. 548, 549-552 (1945)). The notices of appeal in *Madera, Albonico* and *Santa Barbara* were filed on March 11, 1957. The notice in *Ivanhoe* was filed on April 23, 1957. Thus these appeals are in all respects timely, neither premature nor tardy.

II. THE VALIDATION PROCEEDINGS REQUIRED BY FEDERAL LAW ARE CASES OR CONTROVERSIES WITHIN THE MEANING OF ARTICLE III OF THE CONSTITUTION.

Section 46 of the Omnibus Adjustment Act of 1926 provides: "No water shall be delivered upon the completion of any new [reclamation] project until a contract . . . shall have been made with an irrigation district . . . and the execution of said contract . . . shall have been confirmed by a decree of a court of competent jurisdiction" (44 Stat. 649, 43 U.S.C. § 423 (e)).

Three of these cases, *Ivanhoe, Madera* and *Santa Barbara,* are "validation" or "confirmation" proceedings brought to comply with this statutory requirement and the corresponding requirements in the contracts (R. 41-42, 218, 504, 535, 567). State law specifically authorizes these special proceedings to determine the validity of a district's contracts (Calif. Water Code §§22670 *et seq.*, 23225), and of the contracts of the Santa Barbara County Water Agency and its member units (Santa Barbara County Water

Agency Act, § 11.10, Calif. Stats. 1945, c. 1501, p. 2797). These proceedings resemble ordinary actions for declaratory relief.

Confirmation proceedings have long been known to California law (*In re Central Irrigation District,* 117 Cal. 382, 49 Pac. 354 (1897)). They were invented as a device to enhance the attractiveness of district obligations by cutting off the right of the district or its landowners to themselves attack the obligations at some future date (*Tregea v. Modesto Irr. Dist.,* 164 U.S. 179, 181 (1896); cf. *Tulare Irr. Dist. v. Shepard,* 185 U.S. 1, 26 (1902)).

To our knowledge, validation proceedings, as such, have been before this court on only three occasions: *Tregea v. Modesto Irr. Dist.,* 164 U.S. 179 (1896); *Petrie v. Nampa etc. Irrig. Dist.,* 248 U.S. 154 (1918); and *Fidelity National Bank v. Swope,* 274 U.S. 123 (1927). There would be no question of justiciability except that in *Tregea* this court dismissed the case on the ground that there was no case or controversy (164 U.S. at 189). The question there was whether the district had authority to issue bonds, but the suit was brought before the bonds had been issued and before the district had assumed any obligation (164 U.S. 185). The court felt that the proceeding was not adversary in character and was an effort to obtain a merely advisory opinion.

In *Petrie,* however, this court refused to dismiss a validation proceeding on the basis of *Tregea* (248 U.S. at 157). The district presented a proposed con-

tract with the United States Reclamation Service for "examination, approval and confirmation" (248 U.S. 155). The contract had been approved by the state court. The writ of error was dismissed on the ground that the decision was based on an adequate state ground rather than on the ground of absence of a case or controversy.

Finally, in *Fidelity Nat. Bank v. Swope*, this court held that a proceeding to validate an assessment was a case or controversy. The proceedings were found to be judicial and not legislative or administrative, and the reversal of normal parties was held immaterial (274 U.S. at 131). *Tregea* was distinguished on the ground that it rested on this court's interpretation of the California statute (274 U.S. at 133).

But since *Tregea*, the California court has, three times at least, interpreted the California statute to provide for a judicial proceeding. Once was in the *Ivanhoe* case itself (47 Cal.2d 606-607, 306 P.2d 829, AJS 2), again in the *Santa Barbara* case (47 Cal.2d 703, 306 P.2d 878, AJS 206), and the other was on the first opportunity after *Tregea* had been decided (*People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86 (1900)).

Under these circumstances it is submitted that the reasoning of this court in *Fidelity Nat. Bank v. Swope* should control (274 U.S. at 130-131). Since these proceedings are required by law, the collusive element which this court inferred in the *Tregea* case is completely absent. (See 274 U.S. at 133, pointing

out that *Tregea* was "not adversary, being a proceeding by the trustee of the irrigation district against the district itself. . . .") Furthermore, the opinion here will not be merely advisory because the transactions involved are already partially executed, not merely executory.

STATUTES INVOLVED.

The statutes involved in these appeals are set forth in the appendix to this brief as follows:

1. Reclamation Act of 1902, §§5, 6, 8, 32 Stat. 388, 389, 390, 43 U.S.C. §§431, 498, 372, 383 Appendix A, pp. 93-94 herein.
2. Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, 43 U.S.C. §423e Appendix B, pp. 95-96 herein.
3. Section 2 of the Act of August 26, 1937, 50 Stat. 850 Appendix C, pp. 97-98 herein.
4. Section 9 (c), (d), and (e) of the Reclamation Project Act of 1939, 53 Stat. 1194, 1195, 1196, 43 U.S.C. §§485h (c), (d), (e) Appendix D, pp. 99-104 herein.
5. Act of July 2, 1956, 70 Stat. 483 (1956), 43 U.S.C.A. §485h-1 (1956 Supp.) Appendix E, pp. 105-108 herein.
6. Irrigation District Federal Cooperation Law, California Water Code §§23175-23197, 23200, 23225 Appendix F, pp. 109-112 herein.

7. The Santa Barbara County Water Agency Act, Calif. Stats. 1945, c. 1501, p. 2780, as amended by Calif. Stats. 1949, c. 12, p. 18, §§6, 6.3, and 11.10; 1 Deering's California Water Code Ann. Act 7303, West Calif. Water Code App. §§51-6, 51-6.3 and 51-11.10 Appendix G, pp. 113-116 herein.

8. California Water Code §22250 Appendix H, p. 117 herein.

9. California Water Code §§22670-22684 Appendix I, pp. 118-120 herein.

QUESTIONS PRESENTED.

The questions raised by these appeals which are common to all four cases are as follows:

1. Section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. §423e) precludes delivery of water from federal reclamation projects to land held in private ownership by any one owner in excess of 160 irrigable acres unless certain conditions are met.

(a) Does this section apply only to public lands of the United States or does it also apply to lands in private ownership (47 Cal.2d 638-639, 306 P.2d 849, AJS 50)?

(b) Does it deprive owners of more than 160 acres of land in federal reclamation projects in California of property without due process of law, and does it deny them equal protection of

the laws (47 Cal.2d 636, 637-638, 638, 645, 306 P. 2d 847, 848, 853, AJS 47, 48, 49, 59)?

(c) The California Irrigation District Federal Cooperation Law and The Santa Barbara County Water Agency Act provide for the delivery and distribution of water acquired under any contract with the United States "under the relevant acts of Congress" and "in accordance with the applicable acts of Congress" (Calif. Water Code §§23195, 23197(a), 23200; The Santa Barbara County Water Agency Act, §§6, 6.3, Calif. Stats. 1945, c. 1501, pp. 2787, 2788). Is this section 46 one of the "relevant" and "applicable" acts of Congress referred to in these California statutes (47 Cal.2d 639, 306 P.2d 849, AJS 50-51)?

(d) Does the application of this section 46 depend in any way on whether "the title to the water to be purveyed is [or is] not an unlimited title in the United States" (47 Cal.2d 639, 306 P.2d 849, AJS 51)?

(e) Does section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§372, 383) require the United States to deliver water in accordance with a trust under state law, assuming such trust prevents the imposition of the limitation in this section 46 (47 Cal.2d 639, 306 P.2d 849, AJS 51)?

2. Does the validity of the contracts involve the nsideration of the water rights of anyone and parcularly of the United States?

3. Can a trust imposed on water rights pursuant to state law prevent the United States from acquiring the water rights it needs to accomplish a federal purpose?

Certain additional questions present in all the cases except *Albonico,* are as follows:

4. Does federal law provide that upon repayment the districts contracting with the United States must be granted title to "works for the storage and distribution of water to and by the district" (47 Cal.2d 647-648, 306 P.2d 854, AJS 63, "not dependent on a future and necessarily discretionary act of Congress" (47 Cal.2d 631, 306 P.2d 844, AJS 40)?

5. Does federal law require that the contracts with the United States specify an obligation of the contracting district for construction of storage and delivery works (other than local distribution systems for the use of individual districts) to be repaid in 40 years (47 Cal.2d 630-631, 640, 306 P.2d 844, 849-850, AJS 38-40, 52)?

6. Does section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§372, 383) submit the United States to the provisions of state law regulating public utilities where Congress by section 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1196, 43 U.S.C. §485h(e)) has provided a system of regulation for federal projects which may be inconsistent with the state system (47 Cal.2d 642, 306 P.2d 851, AJS 55-56)?

7. Section 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1196, 43 U.S.C. §485h(e)) authorizes the Secretary of the Interior to enter into contracts to furnish water for irrigation purposes from federal reclamation projects. The term of such contracts is not to exceed forty years.

(a) Does this section authorize the United States at its discretion to discontinue water service at the end of the contract term (47 Cal.2d 641, 306 P.2d 850, AJS 54)?

(b) If it does, does it impose upon landowners a burden "'under which they may suffer the loss of water rights at the discretion of the United States" so that it is "contrary to well-established constitutional principles and protections" (47 Cal.2d 643, 306 P.2d 851, AJS 56)?

The remaining questions are present only in *Santa Barbara,* which alone involves contracts for the delivery of water for municipal water supply purposes. The questions, inferentially but not explicitly raised in the opinion below (47 Cal.2d 713, 306 P.2d 884, AJS 221) are as follows:

8. Does section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§372, 383) submit the United States to the provisions of state law regulating public utilities where Congress by section 9 (c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1194, 43 U.S.C. §485h(c)) has provided a system of regulation for federal projects serving water for municipal water supply purposes which may be inconsistent with the state system?

9. Section 9(c)(2) of the Reclamation Project Act of 1939 authorizes the Secretary of the Interior to enter into contracts to furnish water for municipal water supply purposes from federal reclamation projects. The term of such contract is not to exceed forty years.

(a) Does this section authorize the United States at its discretion to discontinue water service at the end of the contract term?

(b) If it does, does it impose upon water users a burden "under which they may suffer the loss of water rights at the discretion of the United States" and is therefore "contrary to well-established constitutional principles and protections" (47 Cal.2d 643, 306 P.2d 851, AJS 56)?

STATEMENT OF THE CASES.

I. THE CASES AND THE CONTRACTS.

The Ivanhoe Irrigation District and the Santa Barbara County Water Agency were organized for the purpose of obtaining water through the United States Bureau of Reclamation, the one from the Central Valley Project (Iv. Pl. Ex. J., pp. 2-3) and the other from the Cachuma Unit of the Santa Barbara County Project (House Doc. No. 587, 80th Cong. 2d Sess. 78-79 (1948), S.B. Df. Ex. A, R. 647-648). The Madera district was organized in 1920 as successor to a district organized in 1888. Both the original and successor districts were opposed by large landowners.

Until the advent of the Central Valley Project the district was not able to secure an adequate water supply (Adams, Irrigation Districts in California (State of Calif., Division of Engineering etc. Bull. No. 21) 199-203 (1929)).

The three contracts involved in the four cases may, for present purposes, be treated as substantially identical. Thus the California Supreme Court decided the *Madera, Albonico* and *Santa Barbara* cases on the basis of the *Ivanhoe* case (47 Cal.2d 694, 697-698, 713, 306 P.2d 894, 896, 884, AJS 145, 183, 221). Elements common to each case are the validity, interpretation, and interpretation as affected by validity of section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. §423(e)), and section 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1196, 43 U.S.C. § 485h(e)), relating to water supplies for irrigation. The *Santa Barbara* case also involves section 9(c) of the Reclamation Project Act of 1939 (53 Stats. 1194), 43 U.S.C. §485h(c)) relating to municipal water supplies, but the other cases do not. Each of the contracts provides for delivery by the United States of an irrigation water supply to the district for a period of forty years at specified rates per acre foot payable annually in advance of delivery (R. 17-21, 192-197, 482-486). Further, the Ivanhoe and Madera contracts, but not the Santa Barbara contract, provide for expenditure by the United States of funds for construction of a system of works to distribute this water supply to the lands within the districts and for repayment by the districts, in forty

equal annual installments without interest, of the amount spent for this purpose.

The so-called "acreage limitation" is in each of the contracts (R. 36-40, 213-216, 497-501).[2] Despite its name, it is a restriction on the delivery of water, not on the ownership of the land.

The districts promise not to furnish water or service made available under the contract to more than 160 acres of irrigable land held by any landowner in the district (320 acres for a husband and wife). But if the owner agrees to sell his "excess" land within 10 years at an appraised price which does not include any enhancement in value resulting from the existing or prospective possibility of securing project water or service (R. 36, 213, 497-498), he may receive water delivered under the contract for all his land (R. 39, 215-216, 500). If he does not desire to sell his excess land he nevertheless may designate his non-excess land and be eligible for project water delivery to 160 or 320 acres, as the case may be (R. 39-40, 216, 500-

[2]The Santa Barbara County Water Agency has entered into contracts with its member units, the City of Santa Barbara and the Carpinteria, Goleta, Montecito and Summerland County water districts. Each of these also contains the acreage limitation and the validity of these contracts is also in issue in this proceeding (R. e.g. 528-532, 560-564). Only the City of Santa Barbara and the Montecito contracts are included in the printed record (R. 505, 537) as, with the exception of the district names, the provisions of the Montecito, Carpinteria, Goleta and Summerland contracts are identical. These six contracts were validated by the trial court in the instant proceeding (R. 623-626). Three other contracts containing the limitation have been validated by final and unappealed decrees. These are between the United States and the Carpinteria, Goleta and Summerland districts for distribution systems under § 9(d) (Calif. Districts Securities Comm. Report, 1954-55, 31 (1956)).

501). These provisions were included because of the requirements of federal law (Omnibus Adjustment Act of 1926, §46, 44 Stat. 649, 43 U.S.C. §423(e)). If the federal law is valid, they are authorized by state law (Calif. Water Code §§23195, 23197, 23200; Santa Barbara County Water Agency Act, §§6, 6.3; Calif. Stats. 1945, c. 150, pp. 2787, 2788). There is nothing in the contracts prohibiting the owner from keeping his excess land and irrigating it with water pumped from underground or acquired from any non-project surface supply.

The Ivanhoe and Madera contracts provide that title to all the project works, including the distribution systems being built with federal funds, shall remain in the United States until otherwise provided by Congress (R. 36, 212). The provision is a restatement of federal law (Reclamation Act of 1902, §6, 32 Stat. 389, 43 U.S.C. §498).

The *Ivanhoe*, *Madera* and *Santa Barbara* cases arose when the districts brought the confirmation proceedings required by law (pp. 5-6 herein). The *Albonico* case resulted from the effort of the Albonicos, husband and wife, to have their land in excess of 320 acres excluded from the Madera district. As decided by the California Supreme Court the *Albonico* case involves only the validity of the water delivery restriction in the Madera contract (47 Cal.2d 697-698, 306 P.2d 896, AJS 183).

II. THE REASONING OF THE CALIFORNIA COURT.

The California Supreme Court either rejected or found it unnecessary to pass upon the miscellaneous attacks made on the contracts under state law (47 Cal. 2d 646-647, 693-694, 713-714, 306 P.2d 854, 893-894, 884, AJS 62, 153-154, 222). The grounds of invalidity of the contracts are all federal. As the court said in *Santa Barbara* in summarizing its opinions in *Ivanhoe* and *Madera:*

> "In their fifth affirmative defense the defendants raise issues which have been discussed and disposed of in Ivanhoe Irr. Dist. v. All Parties, ante, p. 597 [306 P.2d 824], and in Madera Irr. Dist. v. All Persons, ante, p. 681 [306 P.2d 886]. In accordance therewith it is concluded that the excess land provisions of the contracts involved here, which are substantially the same as those in the Ivanhoe and Madera contracts, are inapplicable and if not declared to be so would deprive the landowners of the member units of their property rights without due process of law and constitute a denial of the equal protection of the laws; that the United States is acting in its proprietary capacity as a purveyor of the domestic waters of the state to the agency and its member units; that it is bound to observe and comply with the laws of the state with reference to the rights of the water users being served, and that the contract is invalid insofar as it, by implication or otherwise, provides that the United States can arbitrarily cause to be discontinued the distribution of water to those for whose benefit the right to the water was acquired in the first instance" (47 Cal.2d 713, 306 P.2d 884, AJS 221).

More specifically, the various bases of invalidity are:

1. The 160-acre water limitation provisions of the contracts (R. 36-40, 213-216, 497-501) are invalid because (a) the statute on which they are based, section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. §423e), does not apply as a matter of federal law to the delivery of water to privately owned land (47 Cal.2d 638-639, 306 P.2d 849, AJS 50), and (b) if it did, the statute would be unconstitutional as a deprivation of property without due process and a denial of equal protection of the laws (47 Cal.2d 636-639, 645, 306 P.2d 847-849, 853, AJS 46-49, 59).

2. The provisions of the contracts relating to delivery of and payment for a water supply (R. 17-21, 192-197, 482-486) are invalid because, contrary to federal law, (a) they do not provide for district repayment of a specific sum as the district's share of the construction cost of the main project storage and delivery works serving the districts (47 Cal.2d 630-631, 640, 306 P.2d 844, 849, AJS 38-39, 52), and (b) they authorize the United States to act as a public utility without complying with state public utility regulation (47 Cal.2d 642, 306 P.2d 851, AJS 55-56), and also because (c) they are unconstitutional to the extent that they reserve to the United States the right to discontinue water delivery at the end of the contract term (47 Cal.2d 642-643, 306 P.2d 851, AJS 56).

3. The contract provisions reserving title to all project facilities in the United States until otherwise provided by Congress (R. 36, 212; Reclamation Act

of 1902, §6, 32 Stat. 389, 43 U.S.C. §498), is contrary to the debtor-creditor relationship between the district and the United States derived from federal law (47 Cal.2d 631, 640, 648, 302 P.2d 844, 849, 854, AJS 38-40, 52, 63-64).

The holdings of unconstitutionality are predicated on the theory that the United States is under a duty to deliver water in perpetuity and without regard to the federal statutory restrictions. This duty grows out of the trust which the court has found encumbers the title to all water rights of the United States held for project purposes no matter how or from whom they were acquired (47 Cal.2d 628, 306 P.2d 842, AJS 35). The trust adheres to the water perpetually no matter into whose hands the title thereto passes (47 Cal.2d 625, 626, 306 P.2d 841, 842, AJS 30, 31-32). The trust is for "all of the people" who are in a "position to demand benefits without discrimination" (47 Cal.2d 627, 306 P.2d 841, AJS 33), and "who may become entitled thereto" (47 Cal.2d 628, 306 P.2d 842, AJS 35). Section 8 of the Reclamation Act of 1902 requires that this trust right be specifically recognized (47 Cal.2d 627-628, 306 P.2d 841-842, AJS 33-35). Thus when the contract requires the limitation to be enforced it deprives the landowner of his property, "the use of water to which [he] is entitled" (47 Cal.2d 636, 306 P.2d 847, AJS 46), and is invalid because "the right of an owner of real property to use . . . his property cannot be constitutionally limited on the basis of the amount of property he owns" (47 Cal.2d 637, 306 P.2d 848, AJS 48). Similarly both

section 8 and the trust rights prevent validation of the contract because it is subject to an inference that the landowners "are not entitled to water rights which continue beyond the 40-year term of the contract" (47 Cal.2d 641-643, 306 P.2d 850-851, AJS 54-56).

SUMMARY OF THE ARGUMENT.

Sharply distinguished from the cases at hand are those heretofore decided by this court involving conflicts between the states and the United States. For example, there is no conflict here as to regulatory jurisdiction (cf. *U.S. v. Appalachian Power Co.*, 311 U.S. 377 (1940)), or as to conflicting regulations (cf. *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955)).

What is involved is the authority of the United States and various state agencies to cooperate in the conduct of the Central Valley and Cachuma reclamation projects. The authority for and mode of such cooperation is specifically provided in both state and federal law. Since the cases arise as a result of a cooperative effort, any references to actual or purported controversies over the relative roles of the state and the United States would be oblique and misleading. The compatability of these roles is here insured by statutes obviously drafted for that purpose.

The California court has, however, not considered the case in terms of authority, and has instead considered it in terms of title. It has endowed property

in water with attributes and limitations such that the United States cannot, in its view, acquire the rights needed to perform these contracts. It seems to reason that since the water rights needed to perform the contracts cannot be acquired, the contracts must be invalid. This is an essential, but not the only, fallacy of the opinion below.

Adherence to this fallacy is made bewildering by the fact that the California court recognizes that none of the forms of private rights heretofore known under the law of California have been impaired, and that the United States is proceeding to acquire rights in accordance with state law (47 Cal.2d 618-619, 623, 306 P.2d 836, 839, AJS 19-21, 27). Perhaps this is the reason that the instant cases are cases of first impression. The California court states it can find no authority for applying the limitation "where the federal government had . . . only a trustee's interest in the water to be applied" (47 Cal.2d 637, 306 P.2d 848, AJS 47) (But cf. Jurisdictional Statement pp. 26-27). The quoted words demonstrate the complete circularity of the reasoning. Of course, no such case could be found because none exists. And none exists because never before has it been held that property rights in a state could be endowed with attributes which would prevent the United States from acquiring the rights it needs to accomplish a federal purpose.

The Central Valley Project was specifically authorized by Congress (50 Stat. 850). The Cachuma Project was authorized under section 9(a) of the Reclama-

tion Project Act of 1939 (53 Stat. 1193, 43 U.S.C. §485h(a)). Congress' constitutional power to undertake these "big bundles of big projects" is "clear and ample" (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950)).

The power to undertake the projects has been implemented by the grant of broad authority to acquire property for project purposes. The Central Valley authorization provides: ". . . the Secretary of the Interior may . . . acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said [project] purposes." And reclamation law generally gives the secretary authority, which "could hardly have been conferred in more comprehensive terms," to acquire property for reclamation purposes by condemnation, purchase or appropriation informally (Reclamation Act of 1902, §§7, 10, 32 Stat. 389, 390, 43 U.S.C. §§373, 421; *Henkel v. United States*, 237 U.S. 43, 50 (1915); *United States v. Buffalo Pitts Co.*, 234 U.S. 228, 233 (1914)). The fact that the vendor or condemnee may lack power to convey does not result in a corresponding incapacity of the United States to acquire (*United States v. Carmack*, 329 U.S. 230, 239 (1946); *Henkel v. United States*, 237 U.S. 43, 51 (1915)).

Since the United States can acquire whatever rights it needs, and since the acquisition is not contingent on payment in advance (*Hurley v. Kincaid*, 285 U.S. 95, 104 (1932)), it follows that the United States' water rights are irrelevant in these proceedings. The only questions here are whether the contracts accord

with the requisite state and federal grants of authority, because if they do, the United States has the means to acquire the rights necessary to perform the contracts.

But the assumption that the "excess" landowners have rights which the United States must respect specifically because if lacks the power to acquire them, is not enough to lead to the result of invalidity of the contracts. Even if such rights existed the contracts would be justified on the theory that the United States has the power to condition and control the use of the storage and distribution works which it has built and owns. If the "excess" owners have rights in undeveloped water, there is nothing in these contracts which would prevent them from exercising their rights by building their own project.

Obviously, if the contracts are to be invalidated because they do not encompass an affirmative duty of the United States to deliver water to the "excess" owners in violation of federal law, an additional element must be found. The California court does this by imposing on the United States the obligations of a public utility. This it does despite the restrictions in the federal statutes which, if the utility analogy has any meaning, would be restrictions on the scope of the United States' dedication of its property to a public use.

In this respect the United States is apparently less advantageously situated than a private distributor of water. A private distributor can so control his conduct as to avoid the obligations of a public utility

(*Allen v. Railroad Commission*, 179 Cal. 68, 81-85, 175 Pac. 466, 471-473 (1918)), or, if he assumes them, not be compelled to render service beyond the scope of his dedication (cf. *Hollywood C. of C. v. Railroad Com.*, 192 Cal. 307, 310-311, 219 Pac. 983, 984-985 (1923)).

Inconsistent with the utility obligation, but consistent with the holding that the United States has lost control over its property, is the California court's injection of the issue of title to works. Paradoxically that court finds in federal law a "debtor-creditor" relationship which will require the United States to transfer title to its works despite specific federal legislation to the contrary. In other words the utility's customers will eventually become its owners. Why this happy anomaly results only when the United States is the utility is left unexplained.

The conclusions that the United States cannot acquire what it needs for a federal purpose, and that it must assume duties inconsistent with federal law, depend on the California court's tortured interpretation of section 8 of the Reclamation Act of 1902. That section is construed to give the state that veto power over the specific operation of federal projects which this court has heretofore denied (*Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945); *F.P.C. v. Oregon*, 349 U.S. 435, 445-446 (1955)). Ignored is the actual operation of section 8, which is that those who have valid property rights vested under state law are entitled to compensation if those rights are taken for reclamation purposes (*United States v. Gerlach Live*

Stock Co., 339 U.S. 725, 734-739 (1950); cf. *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 250-251 (1954)). Of course, we do not concede that in this instance rights have been "taken" or that the "rights" involved are not of such an evanescent nature as not to be "property" in any meaningful sense.

We start, therefore, with these assumptions: (1) no rights are involved; (2) if there are rights they have not been taken; and (3) if there are rights which must be taken, the authority to take and pay for them exists. The question then becomes one of inspection of the contracts to ascertain their conformity to state and federal laws. Conformity to state law has been settled by the decisions below. In this brief we attempt to show meticulously the conformity to federal law.

Federal law plainly requires that delivery of water from the reclamation projects involved in these cases be subject to the 160-acre water limitation, and that the contracts so state (Omnibus Adjustment Act of 1926, §46, 44 Stat. 649, 43 U.S.C. §423(e)).

In providing for delivery of water for a forty-year term at a charge per acre foot, without requiring repayment in forty years of a specific sum of money representing a share of the construction cost of the project dams and main canals, the contracts are fully consistent with federal law (Reclamation Project Act of 1939, §§9(c), (e), 53 Stat. 1194, 1196, 43 U.S.C. §§485h (c), (e)). That they do not set forth with

particularity under what terms and conditions water delivery may be continued after the forty-year term of their water delivery provisions expire, neither violates federal law nor creates an implication that when these contracts terminate water delivery may be arbitrarily discontinued. Indeed, the opportunity to contract for continued water delivery is expressly guaranteed by federal legislation enacted since these contracts were negotiated.

Finally, the provisions in the Ivanhoe and Madera contracts reserving to the United States the title to all project property are not in conflict with federal law; they merely restate what federal law requires in any event (Reclamation Act of 1902 §6, 32 Stat. 389, 43 U.S.C. §498).

Our position is based not only on the foregoing legal grounds but also on practical and even moral grounds.

The practical reasons can be illustrated by examples. The Goleta County Water District in the Santa Barbara County Water Agency has a validated contract with the United States for construction of a distribution system. Under this it is obligated to pay the United States some $3,600,000. The funds for payment are intended to be derived from the delivery of water. Therefore, if the Santa Barbara contracts are invalidated the district will either have no means of meeting its obligations, or will have to assess its landowners for the useless system. The Carpenteria and Summerland districts are obligated under similar validated contracts. Further, throughout the Central Valley Project there are at least sixteen unappealed and final judgments validating

similar contracts (Calif. Districts Securities Comm. Report 1954-55, pp. 30-31 (1956)). It is only possible to speculate on the financial hardships which would be worked on these districts through retroactive denial of their arrangements, or alternatively, the administrative complexities resulting from having some of these contracts valid and the remainder invalid.

This leads to the moral ground of our position. Not only do we feel responsible for attempting to vindicate the contracts already validated, but also we feel responsible for preserving the state's ability to cooperate with the United States. The state has for years actively sought federal expenditures for reclamation (H.R. Report, Special Subcommittee on Irrigation and Reclamation 111-112 (1952); Iv, Ex. N). The position we take avoids the embarrassment which would be raised by soliciting federal aid on the one hand and thereafter denying capacity to impose federal conditions on the other (cf. *West Virginia v. Sims*, 341 U.S. 22 (1951)). To paraphrase the language of this court, whatever logic could be summoned to support a contrary view would have some vice, at least the vice of injustice (*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 338 (1893)).

All the cases were decided on the basis of *Ivanhoe*. This is consistent only with exclusive reliance on federal grounds, for there is no state ground common to the *Ivanhoe*, *Madera* and *Alboyico* cases on the one hand, and the *Santa Barbara* case on the other. Each point which might, in isolation, be considered an interpretation of state law is, in fact, contingent upon the

court's decision of interwoven federal questions affecting the capacity of the United States to enter into and implement the contracts. The various bases of invalidity are specifically set out under the Statement of the Case (pp. 18-19 herein). These grounds of invalidity are all federal and are predicated on the theory that the United States is under a duty to deliver water in perpetuity and without regard to federal statutory restrictions.

ARGUMENT.

I. THE DECISIONS REST SOLELY ON FEDERAL GROUNDS.

In their motion to dismiss, the appellees argue that the cases depend solely on state law, i.e., whether the districts have authority to enter into the contracts is a matter of state law (Mo. Dis. 16), and that even if the United States were "the absolute owner in fee of the waters within the Central Valley Project and can condition or limit their use as it sees fit, still the judgments of the court below would stand and the contracts would of necessity be declared invalid (Mo. Dis. 22)."

These contentions are in error. Possible state grounds of decision were definitely excluded. All the cases were decided on the basis of *Ivanhoe*, a technique consistent only with exclusive reliance on federal grounds since there is no state ground common to the *Ivanhoe*, *Madera* and *Albonico* cases on the one hand, and the *Santa Barbara* case on the other. Finally, each point which might, in isolation, be considered an interpretation of state law is, in fact, contingent upon the court's decision of interwoven federal questions affecting the capacity of the United States to enter into and implement the contracts. There is

nothing in California law prohibiting contracts with the United States for reclamation purposes, and the California court so states (47 Cal.2d 630, 306 P.2d 843, AJS 37-38).

A. The Possible State Grounds of Invalidity Were Rejected by the California Court.

The contracts and the state laws authorizing them were attacked on a variety of state grounds, e.g., that they constituted an improper abandonment or delegation of state powers to the United States. These were rejected by the court (47 Cal.2d 630, 646-647, 693-694, 713-714, 306 P.2d 843-844, 854, 893-894, 884, AJS 38, 62, 153-154, 222). Indeed, the greater portion of the *Santa Barbara* opinion consists of a discussion and rejection of various attacks under state law on the existence of the agency and its relation with its member units (47 Cal.2d 707-713, 306 P.2d 880-884, AJS 211-221). Contrary rulings on these points might have constituted adequate state grounds preventing review here. But the actual rulings are favorable to the contracts, and thus show that the grounds of invalidity are federal and only federal.

B. Only Federal Grounds Are Common to the Ivanhoe and Santa Barbara Cases.

The California Supreme Court decided the *Madera*, *Albonico* and *Santa Barbara* cases on the basis of the *Ivanhoe* case (47 Cal.2d 687, 694, 697-698, 713, 306 P.2d 890, 894, 896, 884, AJS 145, 154, 183, 221). These cases do not involve a common state ground. In *Ivanhoe* the court said:

> "The duty of both of the contracting parties in the performance of their obligations to the landowners in the district is set forth in section

22250 of the Water Code. It is there provided that water distributed by districts shall be 'apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district' except as provided otherwise in the code. No pertinent exceptions appear" (47 Cal.2d 636, 306 P.2d 847, AJS 46-47).[3]

The appellees, relying on the above, urge that the decisions thus depend on California Water Code section 22250. Nevertheless, they describe the section correctly as a rule relating only to irrigation districts (Mo. Dis. 12, 13). Section 22250 does not apply to the Santa Barbara County Water Agency, which is not an irrigation district, or to its member units which are county water districts organized under the County Water District Law (Calif. Water Code §§30000 *et seq.*), or to its member unit, the City of Santa Barbara, which is a chartered city under California Constitution, Article XI, section 8. As a chartered city, Santa Barbara has a large degree of control over its water supply as a "municipal affair" not subject to the general laws of the state (Calif. Const. Art. XI, §8, par. 12; *Wehrle v. W. & P. Commrs.*, 211 Cal. 70, 73; 293 Pac. 67, 68 (1930)). An entirely different method of raising money—an *ad valorem* tax for district purposes and metered rates for water delivered to users—applies to the Santa Barbara County Water Agency and its member units (Calif. Water Code, §§31023, 31025, 31701; Santa Barbara

[3]This conclusion on the application of Calif. Water Code § 22250 raises federal questions not only because it relates to the duty of the United States but also because it is based on the assumption that delivery restrictions of the limitation are not applicable. See pp. 63-65 herein.

County Water Agency Act, §§10, 10.1, Calif. Stats. 1945, c. 1501, pp. 2792-2793, Calif. Stats 1949, c. 12, pp. 25-26).

If the California court had been relying on the interpretation of state law, each of the state laws relevant to each of the special situations would necessarily have been considered. Instead, these laws are not mentioned and the Santa Barbara contracts, both master and member unit, are invalidated on the authority of the irrigation district cases (47 Cal.2d 713, 306 P.2d 884, AJS 221). This is a compelling indication that only federal grounds were relied on, i.e., the inability of the United States to acquire the rights needed to fulfill its contracts, for only this ground is common to the *Santa Barbara* case and the irrigation district cases.

C. The Grounds of Invalidity Are All Federal.

There is nothing in California law that prohibits irrigation districts from contracting with the United States. Quite to the contrary, such contracts are specifically authorized by the Irrigation District Federal Cooperation Law (Calif. Water Code, §§23195 *et seq.*). This is pointed out in the *Ivanhoe* opinion:

> ". . . As stated it is certainly true that it was within the power of the district under the laws of this state to do in the first instance all that the United States is obligating itself to do under the contract with reference to the construction of a distributing system. The district was authorized to obtain funds for that purpose by borrowing from the United States with or without the issuance of irrigation district bonds (Wat. Code,

§§23280-23289) and it could contract for the payment for water distributed to it by or through an outside source at a fixed point of delivery upon the payment of the charges agreed upon from funds of its own, if available (Wat. Code §22228). In essence, therefore, we have here one party agreeing to provide the funds for construction work and undertaking to furnish water at a definite delivery point, and the other party agreeing to accept the water at that point with payment therefor at a fixed rate and repayment of the construction charges in installments within 40 years, coupled with what appears to be all sufficient assurances of security in the event of nonpayment. Within the compass of those provisions there can be no doubt of the right and power of the parties to lawfully contract" (47 Cal.2d 630, 306 P.2d 843, AJS 37-38).

1. Invalidity of Federal Laws.

What then in the present contracts did the California court find invalid? The answer is that the water delivery restrictions (acreage limitation) imposed by section 46 of the Omnibus Adjustment Act of 1926 are asserted to be invalid on the two grounds of denial of due process and equal protection. Also assertedly invalid on the one ground of denial of due process are the provisions of the contracts predicated on section 9(e) of the Reclamation Project Act of 1939, i.e., the provisions relating to delivery of and payment for a water supply.[4]

[4]The provision in the Madera and Ivanhoe contracts reserving title to all project facilities in the United States until otherwise provided by Congress were invalidated on the ground that they

These results are predicated on the theory that the United States is under a duty to deliver water in perpetuity and without regard to the federal statutory restrictions. These duties are said to grow out of the trust which the court says will encumber the title to all water rights of the United States held for project purposes, and which will disable the United States from following federal law (pp. 54-57 herein).

2. If the Federal Laws Were Valid the Contracts Would Be Valid.

That the judgments would be different if the California court's view of the rights of the United States were different is plain from the language of the *Ivanhoe* opinion. The court says:

> ". . . the federal law could be applicable only on the theory that the United States is the owner absolute of the domestic waters of the state with the right to the use thereof free from any trust relationship on behalf of the real owners thereof, namely, the water users in the district" (47 Cal. 2d 639, 306 P.2d 849, AJS 51).
>
> "If the United States, or the State of California or any of its agencies, should be declared to be the owner of the title to the water without restriction it would necessarily follow that it would have complete dominion and control over such property for the purposes of distribution or for any other incident of ownership and use. In such case the principles of law ap-

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conflict with the "debtor-creditor relationship existing between the United States and the district[s]" which the court derived from "applicable federal law" (47 Cal.2d 631, 640, 306 P.2d 844, 849, AJS 39-40, 52). This holding is one of interpretation rather than of validity of federal law.

plying to unrestricted ownership would control" (47 Cal.2d 620, 306 P.2d 837, AJS 22).

That the judgments would be different if the rights of the United States had been held to be different is not only evident from what the California court said, but also from what it did not say. Nowhere does the opinion intimate that the state agencies would be inhibited in their contracts with the United States if the United States were able to secure complete title. The closest approach is the statement that "No pertinent exceptions appear" to California Water Code section 22250 (47 Cal.2d 636, 306 P.2d 847, AJS 47). Nevertheless, the court did say:

> "Attention has been called to section 23200 of the Water Code providing that under contracts such as the one in question water 'shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract'" (47 Cal.2d 639, 306 P.2d 849, AJS 51).

But section 46 of the Omnibus Adjustment Act of 1926 was held not to be an "applicable act of Congress" within the meaning of this section and, therefore, not a "pertinent exception" to California Water Code section 22250, because section 46 is unconstitutional.

This interaction of state and federal law raises a federal question. As was said in *Wilson v. Cook*, 327 U.S. 474, 486 (1946):

"The meaning of both statutes [state and federal] as applied in this case, is a federal question, since upon their construction depend rights, powers and duties of the United States."

3. Invalidity of the Contracts Under Federal Law.

In reaching its conclusion that the contract was invalid because it violated the "debtor-creditor" relationship (pp. 86-88 herein) the court again relied exclusively on federal law. This is plain from what it said about the relationship:

"We have heretofore declared the debtor-creditor nature of the contract in question. In arriving at that conclusion it was considered that *applicable federal law* requires that the contract specify a specific amount of money to be repaid by the district by installments, within 40 years; that this is an obligation for repayment of the cost of construction of storage and delivery works, and that the payment by the district be credited against this obligation" (47 Cal.2d 640, 306 P.2d 849-850, AJS 52, emphasis added).

Nowhere in its opinions did the California Supreme Court cite or refer in any way to state law as providing the incidents of the "debtor-creditor" relationship upon which that court predicated its conclusions on the validity of these aspects of the contracts. This omission was not inadvertent; there is no state law on the subject.

Again federal law was the basis of the conclusion of invalidity reached by the California court when it viewed the contracts' water delivery provisions as

placing the United States in the position of a water purveyor furnishing water at a price. The California court quoted the language of section 8 of the Reclamation Act of 1902 which states that the Secretary of the Interior shall proceed in conformity with state law relating to the control, appropriation, use or distribution of water used in irrigation (47 Cal. 2d 642, 306 P.2d 851, AJS 55), and then said:

> "It may fairly be said that the foregoing federal statutory provision remains in full force; that it controls the operations of the Department of the Interior so far as federal law is concerned, and that under the controlling state law, the furnishing of water to consumers by a utility must be subject to and be in conformity with certain rules and regulations established by or under the authority of the Constitution and the statutes of the state" (47 Cal.2d 642, 306 P.2d 851, AJS 55-56).

From this excerpt, it is clear that the California court depended on federal law, section 8 of the Reclamation Act of 1902, as authority for the conclusion that the contract had to conform to state public utility law in order to be valid. There is no intimation in any of the opinions in these cases that state law, of itself, makes execution of such a contract beyond the powers of the districts. Of course there could not be, since state law expressly authorizes districts to contract with the United States for a water supply as well as for other specified purposes (Calif. Wat. Code §23196(b); Santa Barbara County Water Agency Act §6, Calif. Stats. 1945, c. 1501, p. 2787).

4. Invalidity of the Contracts Because of Possible Interpretations.

Federal, not state, grounds are the predicates of the final question relative to the water delivery provisions of the contracts. The court stated:

> "If this contract were construed as imposing upon the district and the landowners therein a burden under which they may suffer a loss of water rights at the discretion of the United States, such a construction would be contrary to well-established constitutional principles and protections" (47 Cal.2d 643, 648, 688, 713, 306 P.2d 851, 854-855, 890, 884, AJS 56, 64, 145, 221).

Two questions are raised by this conclusion: First, do the water delivery provisions of the contracts authorize cessation of water delivery at the end of the contract term? Second, assuming that federal law and the contracts do authorize cessation of delivery, is this "contrary to well-established constitutional principles and protections" (47 Cal.2d 643, 306 P.2d 851, AJS 56)? Neither question can be or was decided by reference to state law. Federal questions, i.e., the interpretation and constitutionality of federal statutes and contracts are exclusively involved (*S.R.A. Inc. v. Minnesota,* 327 U.S. 558, 564 (1946)).

It thus appears that each point which might, in isolation, be considered an interpretation of state law, is in fact contingent upon the court's decision of interwoven federal questions affecting the capacity of the United States. Under these circumstances it is submitted that the interpretation of the state statutes is, in itself, a federal question (*Wilson v. Cook,* 327 U.S. 474, 486 (1946)).

D. Inter-action of State and Federal Laws Raises Federal Questions.

A further ground for considering the interpretation of state law to be a federal question is that California Water Code section 23200 and its companion sections 23195 and 23197 are instances of state laws referring to federal laws. That the interpretation of such state laws involves federal questions is demonstrated in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201-202 (1921), *Standard Oil of California v. Johnson*, 316 U.S. 481 (1942) and *Flournoy v. Wiener*, 321 U.S. 253 (1944).

These state statutes do not merely adopt a federal rule in an area where the federal rule would not otherwise be operative. They are the means whereby the state is enabling itself to take advantage of the substantial federal benefits available under the United States reclamation program by conforming with the federal conditions. It is a meaningless verbalism to say that all the state court did was to interpret the state law to see which federal laws applied and therefore raised only a state question (Mo. Dis., p. 14 n.). The reasons *why* the federal law is held inapplicable or not a "pertinent exception" are the determinant factors in ascertaining reviewability of this state law as one blended with federal law. This uniformity can be achieved only if there is one final arbiter to ascertain the validity of the cooperative effort (Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 Harv. L. Rev. 1498, 1502 (1953)).

State and federal cooperation depends, of course, on both state and federal law. If the California court had held that the state or its agencies could not cooperate with the United States for some reason peculiar to the state, it is conceivable that this might have been a question of state law alone (but cf. *West Virginia v. Sims*, 341 U.S. 22 (1951)). But the California court did not consider the state's ability to cooperate with the United States. It considered the United States' ability to acquire rights within the state. It found that ability lacking. Whether the lack is based on federal or state law, it nevertheless presents a federal question because it involves the capacity of the United States (*Wilson v. Cook*, 327 U.S. 474, 486 (1946)).

II. THESE CASES ARE PROPERLY APPEALABLE.

These cases are properly appealable if the validity of a federal statute is drawn into question and the decision is against its validity (*Flournoy v. Wiener*, 321 U.S. 253, 263 (1944)). The validity of a federal statute is "drawn into question" within the meaning of 28 U.S.C. section 1257 (1) if "the power to enact [the] statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied . . ." (cf. *Jett Bros. Co. v. City of Carrolton*, 252 U.S. 1, 6 (1920)).

In the instant cases it is submitted that an appeal is proper. Although the California court interpreted the federal statute, it did not stop there but also

went on to hold the statute invalid. In this these cases differ from *Hopkins Savings Ass'n v. Cleary*, 296 U.S. 315 (1935). There the state court interpreted the statute to avoid the constitutional issue and went no further (296 U.S. at 332). The situation here resembles that in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120 (1924), i.e., a reading of the *Ivanhoe* opinion as a whole shows that the California court reached the result that section 46 of the Omnibus Adjustment Act of 1926 is inapplicable not merely as a matter of statutory construction but because it believed such a result is constitutionally required. This reading is corroborated by the court's own summaries in the other opinions (47 Cal.2d 687-688, 713, 306 P.2d 890, 884, AJS 145, 221). The result is to prevent the application of the federal statute by invalidating the contracts because they contain the required limitations on water delivery. Such a holding has been reviewed by appeal on at least three occasions (*Wissner v. Wissner*, 338 U.S. 655 (1950); *Kalb v. Feuerstein*, 308 U.S. 433 (1940); *Ex parte Worcester Nat. Bank*, 279 U.S. 347, 359, 360 (1929). (federal statute held invalid under state constitution)).

In the *Ivanhoe* case the state court's treatment of the problem of interpretation is so perfunctory and arbitrary that it is obvious that interpretation actually played no real part in its invalidation of the limitation. The state court first notes that the original version of the water delivery limitations prohibited the sale of the right to use water for more than one hun-

dred and sixty acres "in private ownership" (47 Cal. 2d 632, 306 P.2d 845, AJS 40-41). Then with baffling inconsistency it fails to note equivalent language in section 46 and goes on to hold that "section 46 may be deemed to apply to public lands alone" (47 Cal. 2d 638-639, 306 P.2d 849, AJS 50).

One reason assigned for this conclusion is that "the intention of the act [the Omnibus Adjustment Act of 1926] as shown by section 48 was the development of public lands . . ." (47 Cal.2d 638, 306 P.2d 849, AJS 50). Even if this description of section 48 of the act were correct, it is hardly reasonable that Congress intended a general statement of purpose in one section of the act to nullify a specific, unequivocal, mandatory direction to the Secretary of the Interior in another section of the act to apply the limitation to privately-owned land. Contrary to the California court's assertion, however, section 48 of the act does not even mention public land. It states:

> "The purpose of this act is the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis, and the Secretary of the Interior is directed to administer this Act to those ends" (44 Stat. 650, 43 U.S.C. § 423f).

The second reason assigned for the conclusion is that it follows because section 46 is included in Title 43 of the United States Code, "Public Lands" (47 Cal.2d 638-639, 306 P.2d 848-849, AJS 50). Title 43 is not one of the titles enacted into positive law. The

California court has thus ignored the plain language of the section both as printed in the code and in the statutes at large; it has ignored the rule that even if some conclusion could be drawn from the location of the section in the code this conclusion could not prevail over the language of the statutes at large (*Stephan v. United States*, 319 U.S. 423, 426 (1943); and it has ignored the rule that conclusions as to interpretation cannot properly be drawn from the location of a section in a "prima facie" title of the code (*Warner v. Goltra*, 293 U.S. 155, 160-161 (1934)).

Although the language of the California court is in terms of interpretation, the result and the means whereby it was reached are so eccentric that it is incredible that the language was so intended. The rational explanation of this portion of the opinion is that the California court read out of the statute the language, "Such contract . . . shall . . . provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty acres . . . shall [not] receive water . . . if the owners shall refuse [etc.] . . .", because it believed this result to be constitutionally required. This explanation is consistent with the balance of the opinion.

III. THE WATER DELIVERY RESTRICTIONS ARE VALID.

A. Federal Law Requires Inclusion of the Acreage Limitation in These Contracts.

1. The Plain Language of Section 46 Requires the Limitation.

Both the Central Valley Project and the Cachuma Project are federal reclamation projects. The Central Valley Project was authorized by Congress in section 2 of the Act of August 26, 1937 (50 Stat. 850), which states in pertinent part:

> ". . . except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project. . . ."

In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950), this court held that the language quoted above made the project a reclamation project subject to reclamation law.

The Cachuma Project was authorized by the Secretary of the Interior as a reclamation project in a report and finding of feasibility (H.R. Doc. No. 587, 80th Cong., 2nd Sess. (1948), S.B. Df. Ex. A, R. 647-648), pursuant to the procedure set forth in section 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1194, 43 U.S.C. § 485h(a)). It is thus equally subject to reclamation law.

The 160 acre water limitation provisions of the contracts are based on section 46 of the Omnibus Ad-

justment Act of 1926 (44 Stat. 649, 43 U.S.C. § 423e). This section is the latest of a series of statutory provisions of general applicability relating to this subject. In pertinent part it provides that:

> "No water shall be delivered upon the completion of any new project or division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that *all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres* shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that *no such excess land so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior. . . .*" (Emphasis added.)

Obviously, under the plain words of this section, the limitation applies to service of water from a reclamation project to "all irrigable lands *held in private ownership* by any one owner in excess of one hundred and sixty irrigable acres" (See Taylor, *Destruction of Federal Reclamation Policy? The Ivanhoe Case,*

10 Stanf. L. Rev. 76, 100 et ff. (1957)). The incongruous efforts of the California court to avoid this plain meaning have already been discussed as they have some bearing on the proper remedy before this court (pp. 40-42 herein).

2. Section 46 Continues the Original and General Policy.

Section 46 of the Omnibus Adjustment Act of 1926 preserves the original and express policy of the Reclamation Act by continuing to apply the limitation to the delivery of project water to privately-owned lands. Section 5 of the Reclamation Act of 1902 contained a similar restriction:

> "No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner . . ." (32 Stat. 389, 43 U.S.C. § 431).

Subsequent statutes of general applicability which adapted the water limitation to changing conditions made clear that it continued to cover water service to privately-owned lands.

The Warren Act of 1911 authorized irrigators of privately-owned land outside the boundaries of federal reclamation projects to use the surplus water storage or carrying capacity of the dams and canals of such projects. This was subject to the conditions, however, that:

> ". . . water so impounded, stored, or carried shall not be used other than as prescribed by law as to lands held in private ownership within Gov-

ernment reclamation projects . . ." (36 Stat. 925, 43 U.S.C. § 523);

and that:

". . . water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres . . ." (36 Stat. 926, 43 U.S.C. § 524).

Section 3 of the Act of August 9, 1912 provided:

". . . nor shall water be furnished under said acts nor a water right sold or recognized for such excess [i.e.] . . . in excess of one farm unit as fixed by the Secretary of the Interior, as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres . . ." (37 Stat. 265, 266, 43 U.S.C. § 544).

Finally, section 12 of the Act of August 13, 1914 provided:

"That before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the

project if adopted for construction." (38 Stat. 689, 43 U.S.C. § 418).

3. **The General Policy Applies Unless Expressly Altered by Congress.**

That the 160 acre water limitation applies to all federal reclamation projects, irrespective of whether they contain public or private land, is shown by the fact that Congress has passed special laws when a different result has been desired. Some projects and classes of projects have been placed under special and sometimes more restrictive limitations. These are:

1. Sun River, Owhyhee, Vale and Baker Projects in the States of Idaho and Oregon (44 Stat. 479 (1926)).

2. Columbia Basin Project in the State of Washington (50 Stat. 208 (1937); 57 Stat. 14 (1943), 16 U.S.C. § 835a; 71 Stat. 590 (1957)).

3. San Luis Valley Project in the State of Colorado (66 Stat. 282 (1952)).

4. Washoe Project in the State of Nevada (70 Stat. 777 (1956)).

5. Small Reclamation Projects wherever authorized (70 Stat. 1046 (1956)).

6. Kendrick Project in the State of Wyoming (71 Stat. 608 (1957)).

7. East Bench Unit of the Missouri Basin Project in the State of Montana (71 Stat. 309 (1957)).

Other projects have been completely exempted by express language where no limitation was thought appropriate, as follows:

1. Colorado-Big Thompson Project in the State of Colorado (52 Stat. 764 (1938), 43 U.S.C. § 386).

2. Washoe County Water Conservation District of the Truckee Storage Project and the Pershing County Water Conservation District of the Humboldt River Project, both in the State of Nevada (54 Stat. 1219 (1940)).

3. Owl Creek Unit of the Missouri Basin Project in Wyoming (68 Stat. 890 (1954)).

4. Santa Maria Project in California (68 Stat. 1190 (1954)).

In a somewhat similar category is the Boulder Canyon Project Act (45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t) as it applies to Imperial Irrigation District in California. Section 6 of that act provides that water shall be delivered for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact" (45 Stat. 1061, 43 U.S.C. § 617e). Imperial Irrigation District had for many years prior to the Boulder Canyon Act diverted water from the Colorado River through its own works. The All-American Canal, authorized by the act, provided a new means for delivery of this water. Under these circumstances the Secretary of the Interior held that "this limitation does not apply to lands now cultivated and having a present water right." (Hon. Ray Lyman Wilbur to Imperial Irrigation District, Feb. 24, 1933.) The Imperial Irrigation District water delivery contract, which omits an excess land limitation requirement, was thereafter judicially confirmed in a

proceeding in which the acreage limitation was litigated and found not applicable. But when water was brought by the All-American Canal to lands in the Coachella Valley which had not theretofore been irrigated from the Colorado River, the limitation was applied and the contract with the limitation was judicially confirmed (Opinion M33902, May 31, 1945, Solicitor of the Department of the Interior).

4. Congress Has Refused to Adopt a Special Policy for the Central Valley Project.

There is no similar statutory exemption relating to either the Central Valley Project or the Cachuma Project. To the contrary, the legislative history of the Central Valley Project, the project responsible for most of the agitation in California against the limitation, supports the conclusion that the limitation was intended to apply.

First, it was repeatedly emphasized on the floor of Congress when the Central Valley Reauthorization Act (50 Stat. 850) was being debated that the Central Valley Project was to be a reclamation project with a major purpose of providing homes (81 Cong. Rec. 3905, 4509, 4516, 4540, 4548, 4561, 6704 (1937)). This is an objective which the limitation was designed to promote (Montgomery and Clawson, *History of Legislation and Policy Formation of the Central Valley Project*, 133-136 (U.S. Dept. of Agr. Bur. of Agric. Economics, 1946), Iv. St. Ex. 9).

Second, shortly after the act was passed, when appropriations for the Central Valley Project were

being considered by the House Committee on Appropriations, Representative Clarence F. Lea of California assured the committee that because of the 160 acre water limitation the project could not be used for the benefit of a few:

> "....a member of the subcommittee raised the question a while ago about the possibility of this improvement [Central Valley Project] being used for the benefit of bankers, or those who might become purchasers on account of the farmers being crowded out through foreclosure, or otherwise. I would call attention to the fact, which the committee is probably familiar with, that for several years, it has been the policy of the reclamation service to make contracts or to cover cases where the small ownership could procure the benefit of contracts for water; the general idea being to confine it to those tracts of land that would be sufficient to maintain one family, and the Department has taken a very decided position against permitting the reclamation service to use for speculative purposes and not for the benefit of settlers" (Hearings before House Committee on Appropriations on H.R. 6958, 75th Cong., 1st Sess. 1597 (1937)).

Third, at least two major attempts have been made to secure Congressional exemption of the Central Valley Project from the 160 acre water limitation. This itself is a recognition of the fact that in the absence of exemption the limitation governs. In 1944, the so-called "Elliot Amendment" to the Omnibus Rivers and Harbors Bill (H.R. 3961, 78th Cong., 2d Sess.) was passed by the House of Representatives. It provided:

> "Sec. 4. The excess-land provisions of the Federal reclamation laws shall not be applicable to lands which will receive a water supply from the Central Valley Project, California, reauthorized by section 2 of the Rivers and Harbors Act approved August 26, 1937."

This proposal was rejected by the Senate Committee on Commerce after much discussion (Hearings before Senate Committee on Commerce on H.R. 3961, 78th Cong., 2d Sess. (1944)). In 1947, S. 912, to exempt the Central Valley Project and two other projects from the limitation, was given extensive hearings before a subcommittee of the Senate Committee on Public Lands (Hearings before Subcommittee of Senate Committee on Public Lands on S. 912, 80th Cong., 1st Sess. (1947)), but was not reported out.

Statutory language, legislative history, and Congressional activity and refusals to act, thus all lead to the same conclusion. The 160 acre water limitation applies to the delivery of water to privately-owned land from every federal reclamation project unless it is exempted or subject to special restrictions by express statutory provisions. Since neither the Central Valley Project nor the Cachuma Project has received such special treatment, federal law requires the inclusion in the contracts of the limitation provisions which are contained.

B. The 160 Acre Water Limitation Is a Constitutional Means of Achieving Wide Distribution of the Federal Subsidy Involved in the Delivery of Irrigation Water From Federal Reclamation Projects.

1. The Constitutional Justification for the Limitation.

To provide the water required for the contracts, it was necessary for the federal government to construct storage and delivery facilities of great size and expense. These facilities are described in the feasibility and cost allocation reports on the Central Valley and Cachuma Projects (*Central Valley Project:* H.R. Doc. No. 146, 80th Cong., 1st Sess. 12-14 (1947); see also *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 728-729 (1950); *Cachuma Project:* H.R. Doc. No. 587, 80th Cong., 2d Sess. 30-32 (1948)). By the construction and operation of these facilities the federal government has made available to the irrigators of the Ivanhoe and Madera Irrigation Districts and the Santa Barbara County Water Agency water which they never before were able to receive (47 Cal.2d 658, 306 P.2d 861, AJS 79-80).

Under federal reclamation law, only a part of the cost of the dams, canals and distribution works attributable to irrigation is repayable to the federal government by the irrigators, and that without interest. The price of the water to the irrigator is, therefore, far less than its actual cost. As a result, with the delivery of each acre-foot of water the irrigator receives a federal subsidy. Chief Justice Gibson, dissenting, explained the significance of this subsidy in terms of percentages (47 Cal.2d 658, 306 P.2d 861, AJS 78-79; see also Taylor, *Destruction of Federal Reclamation*

Policy? The Ivanhoe Case, 10 Stanf. L. Rev. 76, 92-96 (1957)). The magnitude of the subsidy is not fully appreciated, however, until it is translated into dollars. This was done in a letter from six California Congressmen to the Attorney General of California after the California Supreme Court decisions in these cases had been announced (Pet. for Rehearing of Appellant State of California to California Supreme Court in *Ivanhoe Irrig. Dist. v. All Parties and Persons,* App. p. ii, contained in record in Case No. 122 herein):

> "The capital investment to put water on land under the Central Valley Project averages $350 per acre. If an irrigator owns 1,000 acres, the capital investment to serve his land is approximately $350,000. This money is interest-free and the interest cost to the federal government over the pay-out period roughly equals the capital investment. In other words, the interest on $350,000 over a 50-year period is roughly $350,000. This is a direct subsidy to the irrigator. Using the percentages on repayment referred to in Chief Justice Gibson's dissenting opinion, the irrigator will pay back approximately $123,000. The balance of the capital investment will be paid by public power revenues. This amounts to $227,000. Thus, the total subsidy to this 1,000 acre irrigator adds up to approximately $577,000."

"The water limitation was intended to prevent use of the reclamation service for speculative purposes, and it insures that the irrigators' subsidy and other benefits of federal irrigation projects will not go in disproportionate share to a few large landowners but

will be confined to holders of moderate-size tracts of land sufficient to maintain one family; its purpose, in other words, is to distribute the government benefits in accordance with the greatest good for the greatest number of individuals" (Gibson, C. J., dissenting, 47 Cal.2d 658, 306 P.2d 861, AJS 79). The effect of the limitation is merely to place a reasonable maximum on the benefit which any one person can gain from the use of federal irrigation facilities. The majority of the California court would reverse it to subsidize most those who own most. Without a limitation, it is obvious that the larger the landholdings of an irrigator and hence the greater the amount of project water delivery he requires, the larger would be his subsidy from the federal government.

c. Analysis of the California Court's Holding of Invalidity.

Despite the common-sense equity of the limitation, the California court has concluded it deprives owners of more than 160 acres of land of property without due process of law and denies them equal protection of law. Its reasoning seems to be as follows:

1. All the people of the State of California have an equitable interest or title in the unappropriated domestic waters of the State, the legal title to which is held by the State (47 Cal.2d 625, 306 P.2d 840, AJS 30).

2. The equitable interest of these beneficial owners is "an inchoate right" to use the water of the state "subject to like enforcement and equal protection of the law", although the right is dependent on com-

pliance with "reasonable terms and conditions" (47 Cal.2d 626, 306 P.2d 841, AJS 31, 32).

3. Under section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§ 372, 383) the United States as a matter of federal law has assumed the obligation of respecting these state-recognized beneficial rights. The United States therefore (a) may not acquire any rights in the waters of the State for reclamation project purposes except as limited by such rights (i.e., it may not acquire an "unlimited title"); and (b) may not deny reclamation project water delivery to the owners of such rights irrespective of the requirement of section 46 of the Omnibus Adjustment Act of 1926 that this be done (47 Cal.2d 628-629, 639, 306 P.2d 842-843, 849, AJS 35, 50-51).

4. If the United States had the power to acquire an "unlimited title", i.e., could become the "owner absolute of the domestic waters of the State", (47 Cal.2d 639, 306 P.2d 849, AJS 51) it then could constitutionally apply the 160 acre water limitation provisions of § 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. § 423e) to privately-owned land in California. But since the United States does not have that power, application of the limitation is unconstitutional. This is because the limitation restricts an owner of excess land in the use and enjoyment of the beneficial right owned by him in the water of the State "on the sole basis of the amount of property he owns" (47 Cal.2d 637, 306 P.2d 848, AJS 48), a basis which is arbitrary and unreasonable and hence constitutes a deprivation of such owner's

property without due process of law and a denial of equal protection of the laws (47 Cal.2d 636-638, 688, 306 P.2d 847-848, 890, AJS 46-49, 145).

5. On the basis of the conclusions summarized above, that the 160 acre water limitation provisions of section 46 of the Omnibus Adjustment Act of 1926 are not applicable to these contracts, it follows that this section 46 is not an "applicable" federal law within the meaning of California Water Code section 23200 which provides that under contracts such as those in question water "shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contracts" (47 Cal.2d 639, 306 P.2d 849, AJS 51).

3. The Sole Justification for Existence of the Trust in Water of the State Announced by the California Court Is to Invalidate the Limitation.

It should be realized at the outset that despite the sweeping and formidable language which the California Supreme Court majority used to describe the trust (e.g., 47 Cal.2d 627, 306 P.2d 841, AJS 32-33), most of the incidents which one would commonly associate with a trust are carefully whittled away.

Generally, the right is subject to "reasonable terms and conditions" (47 Cal.2d 626, 306 P.2d 841, AJS 31). The beneficiaries may have to organize themselves into "properly classified groups" to be "in a position to demand benefits without discrimination" (47 Cal.2d 627, 306 P.2d 841, AJS 33). Notwithstand-

ing the inchoate right, the right to receive water does not accrue by virtue of an application to appropriate, because an application does not vest a water right as part and parcel of a freehold (47 Cal.2d 688-689, 306 P.2d 890, AJS 146). The trust right does not help get water to one whose land is excluded from a district (47 Cal.2d 691, 306 P.2d 892, AJS 150-151) for a landowner does not have a proportionate ownership in the assets of his district (47 Cal.2d 692-693, 306 P.2d 893, AJS 152). And finally one who physically cannot be served may nevertheless be included in a district and assessed (47 Cal.2d 711-713, 306 P.2d 883-884, AJS 218-221), thus providing another example where the trust right does not insure the receipt of water.

Thus, the sole reason for creation of the trust seems to be to provide a device to invalidate the 160 acre water limitation. But even if one were to accept the existence of the trust it would not render unconstitutional the application of the limitation to delivery of water from a federal reclamation project to privately-owned land.

4. The Effect of Section 8 of the Reclamation Act of 1902 on the Power of the United States to Apply the Limitation and Obtain the Necessary Water Rights.

Consider first the theory that whereas the United States could constitutionally apply the limitation if it were able to acquire "unlimited title" to the water which it intended to deliver, federal law forbids the United States not only (a) from acquiring such title, but also (b) from denying reclamation project water

delivery to the owners of the inchoate beneficial rights (47 Cal.2d 627-628, 639, 306 P.2d 842, 849, AJS 33-35, 51). This theory springs essentially from an erroneous interpretation of section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§ 372, 383). The language of that section relied upon by the majority of the California Supreme Court (47 Cal.2d 627-628, 639, 306 P.2d 842, 849, AJS 33-34, 51) reads:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation or any vested right acquired hereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, . . ."

Citing this court's decision in *U. S. v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), as authority (47 Cal.2d 628, 639, 306 P.2d 842, 849, AJS 34, 51) the California Supreme Court majority has given a curious construction to this language. It holds that the provision subjects "whatever interest or title the United States has acquired to water by appropriation, assignment or by other means of acquisition" to "the limitations of title herein determined [i.e., to the inchoate beneficial rights of the water users of the State]" (47 Cal.2d 628, 306 P.2d 842, AJS 35) and further that under this provision "state laws remain unaffected by later [federal] enactments" (47 Cal.2d 639, 306 P.2d 849, AJS 51). In effect, the

California Supreme Court's holding is that section 8 compels the United States to give *specific* recognition to water rights established under state law (1) even though this would violate other and later federal enactments; and (2) even though the authority to acquire the rights needed to construct and operate reclamation projects is expressly granted by other statutes (53 Stat. 1197, 43 U.S.C. § 389; 50 Stat. 850; 32 Stat. 389, 390, 43 U.S.C. §§ 373, 421); and (3) even though this court has recognized that some rights for the project have been acquired under the United States' power of eminent domain (*U. S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950)).

This construction of section 8 not only patently violates the common-sense canons of statutory interpretation, that the later governs the earlier and that the specific governs the general, but is also contradicted by the authorities. The only case cited by the California Supreme Court is *U. S. v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). But, on this issue, that case held only that if property rights established under state law are taken by the United States in connection with the building and operation of a federal reclamation project, the owner is entitled to compensation. The *Gerlach* case did not even suggest, nor has any other case before those now being appealed, that section 8 constitutes either: (1) an anticipatory repeal of later federal enactments in favor of the presumed requirements of state law; or (2) a relinquishment of the power to condemn state recognized water rights.

As to the first point, this court in *Nebraska v. Wyoming,* 325 U.S. 589, 615 (1945), construed section 8 quite differently: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system".

As to the second point, the *Gerlach* case itself involved a taking of water rights established under state law. The taking was necessary because satisfaction of those rights by deliveries would have deprived the Central Valley Project of water needed for its planned operation. In our cases if "unlimited title" in water rights is really required to enable the United States to apply the limitation, the justification for a taking of the outstanding inchoate beneficial rights is even plainer—the necessity to obey an express mandate of federal law. The fact that those rights are described as being held in trust rather than absolutely cannot weaken the power to acquire what is needed (*United States v. Carmack,* 329 U.S. 230, 239 (1946)).

If compensable rights have already been taken, compensation may be had, as in the *Gerlach* case, by a suit for damages under the Tucker Act (28 U.S.C. §§ 1346(a)(2), 1491). But, as pointed out by Chief Justice Gibson dissenting in the *Ivanhoe* case "the problems of compensation are not within the issues of this proceeding" (47 Cal.2d 658, 306 P.2d 861, AJS 79; cf. *Yearsley v. Ross,* 309 U.S. 18, 21 (1940)).

5. The Limitation Does Not Deprive Owners of Excess Land of Any Inchoate Beneficial Water Rights Owned by Them Without Due Process of Law and Does Not Deny Them the Equal Protection of the Laws.

Since the United States is empowered to secure "unlimited title" in the water to be delivered, if such title is necessary to apply the limitation, the predicate on which the California Supreme Court majority rested its conclusion of unconstitutionality of the limitations fails. But even without considering the United States' undoubted power of eminent domain, it is clear the conclusion cannot stand. Analysis reveals plainly that the 160 acre water limitation does not deprive anyone of the inchoate beneficial rights which he may have in the domestic waters of California.

The limitation is a restriction on the service which can be received from federally-financed irrigation works. The water users remain as free as they ever were to perfect whatever property right they may have in the undeveloped waters of the State. Their use and enjoyment of such property right is involved here only because they desire to use and enjoy it through project works financed and constructed by the United States. Whatever the nature of the right they may have by virtue of state law in water as it flows in its natural state, this cannot conceivably give them a property right in the works of the federal government. Any such right must be derived from federal law, which requires the 160 acre water limitation. Therefore, the restrictions on the use of federal project facilities for delivering water to excess land,

imposed by the limitation, do not deprive the owners of any property possessed by them.

Of course, the "excess" landowners hoped to enjoy to the full the increase in values due to the presence of a reclamation project (Taylor, *Destruction of Federal Reclamation Policy? The Ivanhoe Case,* 10 Stanf. L. Rev. 76, 92-96 (1957)). But frustration of a hoped for economic advantage is not synonymous with taking of property *(U. S. v. Willow River Co.,* 324 U.S. 499, 502-503 (1945)). The situation can well be described in the language of this court in *Wickard v. Filburn,* 317 U.S. 111, 133 (1942):

> "That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the government gives and do nothing that the government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law."

Nor, in the light of the subsidy involved in project water service, as explained above (pp. 52-54 herein), does the limitation deny equal protection of the laws? Actually there is no problem of discrimination at all. Every water user within the contracting district is treated with equality. Each is entitled to delivery of a surface supply of water from the project for 160 acres of land owned by him.

But even if the limitation is considered as creating a classification, it is a reasonable classification, made for the purpose of preventing the undue concentration of the benefits of the program. The power to

condition equitably the receipt of governmental bounty is inherent in the very power to distribute such bounty in the first place (*Wickard v. Filburn,* 317 U.S. 111, 133 (1942); *Steward Machine Co. v. Davis,* 301 U.S. 548, 584-585 (1937)).

6. Section 46 of the Omnibus Adjustment Act of 1926 Is an "Applicable" and "Relevant" Act of Congress Under California Water Code Sections 23197(a) and 23200.

The California Irrigation District Federal Cooperation Law (California Water Code §§ 23175 et seq.) authorizes irrigation districts to "cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto . . ." (Calif. Wat. Code § 23195) for the purposes, among others, of "a water supply" or "accomplishing any of the purposes of the district" (Calif. Wat. Code § 23196(b), (g)). California Water Code sections 23197(a) and 23200 prescribe the following rules for distribution of the water so provided:

> "23197. In a contract made pursuant to section 23196 a district may include provision for either or both of the following:
>
> "(a) Delivery and distribution of water for the land in the district *under the relevant acts of Congress* and the rules and regulations established thereunder."
>
> * * *
>
> "23200. All water, the right to the use of which is acquired by a district under any contract with the United States shall be distributed and apportioned by the district *in accordance with the*

applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, and provision may be made in the contract for the refusal of water service to any or all land which may become delinquent in the payment of any assessment levied for the purpose of carrying out the contract." (Emphasis added.)

The power of irrigation districts to cooperate and contract with the United States as set forth in the Irrigation District Federal Cooperation Law is also expressly extended to the Santa Barbara County Water Agency (Santa Barbara County Water Agency Act, § 6, Calif. Stats. 1945, c. 1501, p. 2787).

In the previous discussion, we have shown that the 160 acre water limitation provisions of section 46 of the Omnibus Adjustment Act of 1926 apply to the delivery of water to privately-owned land as a matter of federal law and that they are constitutional. It follows, therefore, that section 46 is one of the "relevant" and "applicable" acts of Congress referred to in California Water Code sections 23197(a) and 23200 as controlling the delivery, distribution and apportionment by the contracting districts of the water made available by their federal contracts.

The opposite holding by the majority of the California court (47 Cal.2d 639, 306 P.2d 849, AJS 51) was based on their conclusion that the limitation cannot constitutionally be applied because the United States cannot acquire an "unlimited title" in the

water. If that conclusion falls, obviously so does the holding derived from it.

It follows also that had the California court reached the right conclusion on the questions of the applicability and constitutionality of the limitation, it would of necessity have changed its holding respecting California Water Code § 22250. Their holding was that the general rule of water apportionment for irrigation districts provided by that code section governs the distribution of water received under federal contracts, i.e., that there are "no pertinent exceptions" to that rule (47 Cal.2d 636, 306 P.2d 847, AJS 46-47). The correct holding, of course, is that California Water Code sections 23197(a) and 23200, providing in effect for apportionment of water in accordance with the 160-acre water limitation, *are* pertinent exceptions to section 22250 in situations where the water is received pursuant to federal contracts. Insofar as the *Santa Barbara* case is concerned, however, Water Code section 22250 is irrelevant in any event. This is because it applies only to irrigation districts and has no equivalent in the law governing the Santa Barbara County Water Agency or any of its member units.

These questions ostensibly involving construction of state laws are actually federal questions because: (1) they relate to the capacity of the United States, the title it can acquire for a federal purpose, and its obligations, if any, under state law; and (2) the state law by its own terms is made dependent on federal law (pp. 33-35, 38-39 herein).

IV. THE PROVISIONS OF THE CONTRACTS RELATING TO WATER DELIVERY AND PAYMENT ARE VALID.

A. These Provisions Conform Literally With Federal Law.

The United States has been constructing and operating projects to irrigate arid and semi-arid western lands since the enactment of the Reclamation Act of 1902. The basic feature established then—delivery of irrigation water from works constructed with Government funds under contracts providing for the recovery from the water users of construction costs without interest over a period of years—has been maintained to this day, although the method of recovering the costs has been changed from time to time, and the portion of the costs recoverable has been decreased.

Originally, the repayment period was 10 years (Reclamation Act of 1902, § 4; 32 Stat. 389, 43 U.S.C. § 461). The period was changed in 1914 to 20 years (Reclamation Extension Act of 1914, §§ 1, 2, 38 Stat. 686, 687, 43 U.S.C. §§ 471, 472, 475); in 1924 to an indefinite period determined by the productive power of the land (Second Deficiency Act of 1924, § 4(F), 43 Stat. 702, 43 U.S.C. §§ 473, 474); and in 1926 to 40 years (Interior Dept. Approp. Act, 1927, 44 Stat. 479; Omnibus Adjustment Act of 1926, §§ 45, 46, 44 Stat. 648-650, 43 U.S.C. §§ 423d, 423e).

Today recovery of irrigation construction costs is governed by sections 9(d) and 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1195, 1196, 43 U.S.C. §§ 485h(d), 485h(e)) as amended by the Act of July 2, 1956 (70 Stat. 483, 43 U.S.C.A. § 485h-1

(1956 supp.)). Section 9(d) provides for a 40-year period of payment by the contracting district of a specific amount of money computed to be its share of the construction cost of the works which serve it; this payment period starts to run after an initial development period of not more than 10 years. Section 9(e) provides an alternative to section 9(d) as follows:

> "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d)."

The key requirements of the type of contract authorized by this statutory provision are as follows:

1. This type of contract may be used *"in lieu"* of a repayment contract pursuant to the provisions of subsection (d) of section 9 to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation.

2. Either short or long term contracts to furnish water for irrigation purposes are authorized.

3. The term of any contract may not exceed forty years.

4. The contracts must provide for rates for the furnishing of water which in the judgment of the Secretary of the Interior will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation. The Department of the Interior has construed this to mean that irrigation construction costs may be recovered by means of 9(e) contracts in any reasonable period within the useful life of the project and need not be recovered within the 40-year term of the initial contract with a district (Opinion of the Solicitor of the Dept. of the Interior (M-35047, May 24, 1948)). This administrative interpretation has been approved by Congress in legislation enacted in 1956 (70 Stat. 483, 43 U.S.C.A. § 485h-1 (1956 supp.)).

5. The contracts must provide for payment of these rates each year in advance of delivery of water for said year.

The provisions relating to irrigation water delivery and payment in the three contracts with the United States in issue in these cases (Ivanhoe contract: Arts. 10-17, R. 17-25; Madera contract; Arts. 3-11, R. 192-202; Santa Barbara Contract: Arts. 10-17, R. 482-493) conform faithfully to the requirements of section 9(e) as listed above. The provisions are in lieu of a general repayment obligation payable in forty years as would otherwise have been required under section 9(d); they undertake to furnish water (e.g., Ivanhoe contract, Art. 11, R. 17-19) for irrigation purposes (e.g., *id.*, Art. 17, R. 25); the term is forty years (e.g., *id.*, Art. 10, R. 17); and the rates for furnishing of water included therein (e.g., *id.*, Art. 13(a), R. 19) are based on the judgment of the Secretary of the Interior that sufficient revenue will be produced to cover an appropriate share of the annual operation and maintenance cost of the particular project and also to return to the federal government in a period greater than 40 years but within the useful life of the project the portion of the project construction cost allocated for repayment by irrigators (Central Valley Project: H.R. Doc. No. 146, 80th Cong., 1st Sess. 5, 9-10, 17-22 (1947); Cachuma Project: H.R. Doc. No. 587, 80th Cong., 2d Sess. 22, 33-34 (1948), S.B. Df. Ex. A, R. 647-648).

The Santa Barbara County Water Agency contract provides for delivery of water for municipal water

supply purposes in addition to irrigation. The contract provisions covering delivery and payment of that supply conform to the requirements of alternative (2) of section 9(c) of the Reclamation Project Act of 1939 (53 Stat. 1195, 43 U.S.C. § 485h(c)). Section 9(c) provides in pertinent part:

> "The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided,* That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ percentum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year."

Alternative (1) of section 9(c) resembles section 9(d) in that both provide for a fixed construction cost obligation. Alternative (2) of section 9(c) is analogous to section 9(e) in that both provide for furnishing water at rates designed to cover an appropriate

share of the project's fixed charges, without stating a maximum period for full recovery of construction costs.

B. Analysis of the Objections of the California Court to the Water Delivery and Payment Provisions.

Despite the fact that the water delivery and payment provisions of the three contracts faithfully conform to the requirements of these sections of the law, the majority of the California Supreme Court has concluded that they are invalid.[5] This conclusion was predicated on the following holdings:

1. Applicable federal law requires that a water supply contract between the United States and an irrigation district "specify a specific amount of money, to be repaid by the district in 40 years," as the district's obligation for repayment of the cost of construction of all storage and delivery works serving it, which these contracts do not do (47 Cal.2d 630-631, 639-640, 688, 306 P.2d 843-844, 849-850, 890; AJS 38, 52, 145).

2. The water delivery provisions of the contracts, by implication or otherwise, purport to grant to the United States the right to distribute water to consumers at a price without compliance with the laws of California relating to the regulation and control of public utilities in the distribution of the State's domestic water; this is in conflict with controlling federal

[5]The Court did not discuss the legality of the municipal water supply provisions of the Santa Barbara contract, but inferentially its views on section 9(e) seem to apply equally to section 9(c)(2). Our discussion will similarly be restricted henceforth to section 9(e), but the principles discussed are equally applicable to section 9(c).

law, section 8 of the Reclamation Act of 1902 which requires the United States to comply with such laws of California (47 Cal.2d 641-642, 644, 648, 688, 306 P.2d 851, 852, 854-855, 890; AJS 54-56, 58-59, 64, 145).

3. To the extent that the water delivery provisions of the contract, by implication or otherwise, reserve to the United States the right at its discretion to discontinue water service at the end of the contract term, those provisions are "contrary to well established constitutional principles and protections" (47 Cal.2d 643, 688, 306 P.2d 851, 890, AJS 56, 145).

C. Federal Law Does Not Require That a Water Supply Contract Under Section 9(e) of the Reclamation Project Act of 1939 Contain a Construction Obligation for Repayment by the District in 40 Years.

The majority of the California Supreme Court concluded that:

> ". . . applicable federal law requires that the contract specify a specific amount of money to be repaid by the district by installments, within 40 years; that this is an obligation for repayment of the cost of construction of storage and delivery works, and that the payment by the district be credited against this obligation." (47 Cal.2d 640, 306 P.2d 849-850, AJS 52).

This conclusion is correct only insofar as the contract concerns the recovery of costs expended for construction of a distribution system to distribute water to the district's water users within its boundaries. The last sentence of section 9(e) expressly requires that such cost be covered by a 9(d) type contract. Accordingly, Part B in the Ivanhoe and Madera contracts

establish a total distribution system construction obligation, a repayment period, annual installments and provisions for crediting payments against that obligation (Ivanhoe contract, Art. 19, R. 26-28; Madera contract, Art. 13, R. 203-205).

But the conclusion is clearly not correct with respect to payment for water delivery from "storage and delivery works" common to the entire project when the 9(e) alternative type of contract is used. The plain words of section 9(e), as we have previously noted, show that it differs from section 9(d) in *not* requiring the specification of a specific amount of money for payment in 40 years as the district's obligation for repayment of the cost of construction of the project's main water supply features, and in permitting instead the type of arrangements which the contracts in issue contain.

If there ever was any doubt that section 9(e) authorizes water supply contracts like those in issue in these cases, there can be doubt no longer since the Act of July 2, 1956 (70 Stat. 483, 43 U.S.C.A. § 485h-1 (1956 Supp.)). The purpose and effect of that act were explained in the report by the House Committee on Interior and Insular Affairs on H.R. 101, the bill which was enacted:

"PURPOSE OF THE BILL

"This bill relates to the administration by the Secretary of the Interior of section 9, subsections (d) and (e), of the Reclamation Project Act of 1939. It would alleviate several major objections

that have been directed against the type of contract—sometimes called a 'water service contract' or a 'utility-type contract'—which has been written by virtue of section 9(e) of the Reclamation Project Act of 1939. These objections or complaints are (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a 'permanent right' to the use of water under this type of contract.

"EXPLANATION OF THE BILL

"With respect to renewal, this legislation directs the inclusion in any long-term 9(e) type contract—that is, contract the term of which is more than 10 years—of provision for renewal if the contracting organization so requests. Such renewal would take into consideration increases or decreases in construction, operation and maintenance costs, and improvement or deterioration in the contracting party's repayment ability.

"There are two provisions in the bill which assure credit toward repayment and eventual repayment of construction costs. First, the bill directs the Secretary of the Interior to credit each year, toward repayment of construction costs, so much of the amount paid by the contracting organization as is in excess of the operation and maintenance expenses for that year. At such time as the

sum of such credits is equal to the amount established as the organization's appropriate share of the construction cost, then no construction component will thereafter be included in the water charges. Secondly, it provides that a long-term contract entered into under section 9(e) can be converted to a contract under section 9(d) at such time as the amount of the construction costs remaining to be repaid can be repaid within the term of a contract under section 9(d).

"With respect to assurance of permanent water service, the bill provides that any party to any contract entered into pursuant either to section 9(e) or section 9(d) will have first right to a stated share of the project's available water supply during the term of the contract or any renewal thereof. Upon completion of payment of that part of the construction cost assigned for ultimate return by the contracting organization, the right to a stated share of the project's water supply would become permanent." (H.R. Rep. No. 1754, 84th Cong., 2d Sess. 2 (1956).)

The bill was similarly understood by the Senate Committee on Interior and Insular Affairs, which stated in its report (Sen. Rep. No. 2241, 84th Cong., 2d Sess. 2 (1956)):

"The committee concurs fully with the views expressed by the House Committee on Interior and Insular Affairs in Report No. 1754.

"The Senate Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 101) relating to the administration by the Secretary

of the Interior of section 9, subsections (d) and (e), of the Reclamation Project Act of 1939, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

"PURPOSE OF THE BILL

"The bill is directed toward perfecting the basis for the administration by the Secretary of the Interior of subsections (d) and (e) of Section 9 of the Reclamation Project Act of 1939. Its provisions would make it possible for the Secretary of the Interior in approving so-called 'water service' or 'utility type' contracts to meet objections that have heretofore been made to agreements written, under interpretations by the Department, of section 9(e) contracts.

"The three major objections that are met by the bill are (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a 'permanent right' to the use of water under this type of contract.

"The so-called water service or utility type contracts as authorized by the Reclamation Project Act of 1939 represented an innovation in reclamation law. For several years, water users' organizations were reluctant to enter into contracts of these types because of the objections cited. How-

ever, in the last 10 years more than 35 9(e) contracts containing its provisions have been approved. Twenty-seven of the contracting organizations are in California with others in the Missouri River Basin project area. Thus, it would appear that the principles of the two sections are generally accepted, but it has been recognized that the contracting organizations were entitled to consideration which the legal advisers of the Department held were not specifically authorized by the 1939 act.

"NO CHANGES IN EXISTING LAW

"'H.R. 101 avoids any amendment to the text of subsections 9(d) and 9(e), but lays down the course to be followed by the Secretary of the Interior in administering the law. . . .'"

The act expressly recognizes that a specific construction obligation for full repayment by the contracting district within 40 years need not be provided in a 9(e) contract. It states that in long-term 9(e) contracts hereafter entered into, if the contracting district so requests, provision shall be included (a) for renewal of the contract under stated terms and conditions which shall provide for changes in the charges to reflect changes in construction, operation and maintenance costs (§ 1(1)), and (b) for conversion of the contract into a 9(d) contract at such time as the remaining amount of construction cost which is properly assignable for ultimate return by the organization can probably be repaid to the United States within the term of a 9(d) contract (§ 1(2)).

The conclusion of the majority of the California Supreme Court that federal law now has, or previous to the enactment of this 1956 Act had, an inflexible requirement that all water delivery contracts provide for repayment of a fixed obligation within 40 years is utterly irreconcilable with the foregoing provisions of the act. In addition, it is significant that the recommendations of the Bureau of the Budget that the bill require the establishment of water rates which would repay the irrigation investment over a period of not more than 50 years (H.R. Rep. No. 1754, 84th Cong., 2d Sess. 6 (1956)) were ignored. The plain implication in the act is thus that there is no fixed maximum period for recovery of irrigation costs.

The act expressly recognizes also that provision for giving credit to the contracting district for the portion of the payments that exceed its share of the project's operation and maintenance cost need not be included as part of the written 9(e) contract, but rather that credit shall henceforth be given simply as a matter of administration of both existing and new 9(e) contracts (§ 1 (3)).

The act requires that the Secretary of the Interior now establish a construction obligation for each contracting district as soon as he can feasibly do so, but there is no requirement that even after this obligation is fixed it be stated in the 9(e) contract (§ 1 (3)). Of course, total construction cost may not be capable of being fixed for many years after water is first available, especially in large and expanding projects which are built over a long period of years. For ex-

ample, the first long-term 9(e) contract for delivery of water for irrigation from the initial units of the Central Valley Project was signed in 1945 (Montgomery and Clawson, *History of Legislation and Policy Formation of the Central Valley Project* 171 (U.S. Dept. of Agric., Bur. of Agric. Econ. 1946), Iv. St. Ex. 9). Since then, the project has been augmented by authorization of the American River Basin Development (63 Stat. 852), the Sacramento Valley Canals (64 Stat. 1036), and the Trinity River Division (69 Stat. 719), none of which has yet been completed.

D. Federal Law Is Not Violated by the Fact That the Water Delivery Provisions of the Contracts May Not Be in Conformance With State Laws and Regulations Concerning the Control of Public Utilities.

The majority of the California court has condemned the water delivery and payment provisions of the contracts as violative of federal law on the ground that they provide for activities "by-passing" state public utility law. The majority declared:

> "The effect of the validation of this contract would be, impliedly at least, to approve a procedure by which the United States as a purveyor of the domestic waters of this state, might continue indefinitely to by-pass the established law of the state and procedures thereunder applicable to water services generally.
>
> "In furnishing its domestic waters to consumers at a price, the activities of the United States under its purported construction of section 9(e) resemble those of a public utility acting in a pro-

> prietary capacity. As above noted, the Reclamation Act of 1902 provided that: 'Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws . . .' It may fairly be said that the foregoing federal statutory provision remains in full force; that it controls the operations of the Department of the Interior so far as federal law is concerned, and that under the controlling state law, the furnishing of water to consumers by a utility must be subject to and be in conformity with certain rules and regulations established by or under the authority of the Constitution and the statutes of the state'' (47 Cal. 2d 642, 306 P.2d 851, AJS 55-56).

Here, again, as in its consideration of the validity of the 160 acre water limitation, the California Court has erroneously construed § 8 of the Reclamation Act of 1902. We find it necessary once again to refer to this Court's statement in *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945), that where Congress has provided a system of regulation for federal projects, section 8 does not compel that system to give way before an inconsistent state system. Here, as we have shown, in § 9(e) Congress has provided a system for delivering water and recovering irrigation costs. As long as the contracts in issue are consistent with that section, federal law is satisfied, irrespective of the

fact that the contracts may cast the United States in the role of a public utility in a manner deemed contrary to state law regulating public utilities.

It is our position, however, that there is nothing in the contracts or in the law on which they are based, which in fact compels the United States to become a public utility.

First, the Act of July 2, 1956 (70 Stat. 483, 43 U.S.C.A. § 485h-1 (1956 Supp.)) discussed above, sets at rest any doubt as to the repayment objective of 9(e) contracts. Consistent with the prior administrative interpretation of § 9(e) by the Department of the Interior, the Act provides for inclusion in the rates for water delivery of a reasonable construction component (§ 1(6)). When the contracting district's share of the construction obligation has been recovered through payment of these water rates, no further construction component is to be included (§§ 1(3), (6)).

Second, there was no reference or citation of any sort by the California Supreme Court majority to the "established law of the state and procedures thereunder applicable to water services generally," the "certain rules and regulations established by or under the authority of the Constitution and the statutes of the state" (47 Cal.2d 642, 306 P.2d 851, AJS 55-56), or "the laws of the state, both constitutional and statutory, respecting the regulation and control of public utilities in this state" (47 Cal.2d 644, 306 P.2d 852, AJS 59) which the majority feared would be violated by the 9(e) contract. Nor was there any explanation as to just how the 9(e) contract would

violate them. We submit that these omissions were not fortuitous. There simply is not anything in the California Constitution, California statutes, or California court decisions prior to the ones now being appealed, that the California Supreme Court could point to. In such total absence of reason or authority, this conclusion of the California Supreme Court should be rejected as "unsubstantial and illusory" *(Lawrence v. State Tax Comm.*, 286 U.S. 276, 282-283 (1932)).

E. The Water Delivery Provisions of the Contracts Do Not Reserve to the United States the Right Arbitrarily to Discontinue Water Delivery at the End of the Contract Term.

The majority of the California Supreme Court stated that the 9(e) contracts "would be contrary to well-established constitutional principles and protections" if they were construed as reserving to the United States the discretion arbitrarily to discontinue water service at the end of the contract term (47 Cal. 2d 643, 688, 713, 306 P.2d 851, 890, 884, AJS 56, 145, 221). It is our view that this constitutional question was not really involved in these cases and should not have been decided.

First, it should be noted that the California Court avoided a square holding that the contracts *should* be construed as reserving the right of arbitrary discontinuance of water delivery. Thus, what the Court declared to be unconstitutional in this regard is a *possible interpretation of the contracts* rather than the contracts themselves or the law or which they are based. Such a possible interpretation is immaterial to the issues of these cases. It is a cardinal rule of con-

tract interpretation that if a contract is capable of two interpretations, one legal and one illegal, the interpretation which makes it legal will be preferred (3 Williston, *Contracts,* § 620, pp. 1785-6 (Rev'd ed. 1936)). This rule is part of the statute law of California (Calif. Civ. Code §§ 1643, 3541). Having tacitly conceded that the contracts are subject to a construction which would avoid constitutional objections it was improper for the California Supreme Court, even obliquely to have questioned the validity of the contract on this ground. Of course this ambivalent mode of construction of the contracts may be disregarded since it concerns the authority of the United States, a federal question *(S.R.A., Inc. v. Minnesota,* 327 U.S. 558, 564 (1946)). It may be relevant, however, as showing a "palpable evasion" of state law in order to avoid a federal rule (cf. *West Virginia v. Sims,* 341 U.S. 22, 33 (1951) (concurring opinion)).

Second, to the extent that the contracts say anything at all respecting delivery of water after their 40-year terms have expired, they indicate an affirmative intention to continue water service. The Madera contract expressly recognizes that the District has a right, under its 1939 contract selling certain property to the United States for the Central Valley Project (47 Cal.2d 686, 306 P.2d 889, AJS 143), to contract for permanent service from the project by negotiating successive term contracts for water delivery within six months after the termination of the present contract and each succeeding contract (Madera contract, Article 4, R. 192-193). Article 10 of the Santa

Barbara contract contains the following proviso (R. 482): "*Provided*, That in the event the Congress of the United States during the term of the contract enacts legislation permitting the renewal or extension of this contract, the Agency may, at its option, extend or renew this contract in conformance with and subject to the terms of the then existing law". The Ivanhoe contract alone is simply silent on the subject.

At the time these contracts were entered into, section 9(e), the statute which authorized them and limited their term to 40 years, was silent as to what would happen after the expiration of their term. Nor did any other relevant statute require this subject to be covered in this type of contract. In these circumstances, to speculate that water delivery might be arbitrarily discontinued after the contract's end is to go completely outside the basic issue of these cases—the validity of the contracts as they have been written. "To predetermine even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions" (*United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940)). "The process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency" (*New York v. United States*, 326 U.S. 572, 583 (1946)).

Finally, since enactment of the Act of July 2, 1956, there can no longer be doubt, if ever there really was any, that the districts having long-term 9(e) contracts can be assured of continued water service after their present contracts expire. Under this act, if the other contracting party requests, the Secretary of the Interior must include in 9(e) contracts provision for their renewal (§ 1(1)) and also for their conversion at an appropriate time into 9(d) type contracts (§ 1(2)). In addition the contracting district under a 9(d) or 9(e) contract has a first right (to which the rights of holders of any other type of irrigation water contract are subordinate) to a stated share or quantity of the available project water supply (§ 1(4)). The Secretary of the Interior is expressly authorized to negotiate amendments to existing 9(e) contracts to conform them to the provisions of the Act (§ 2).

Hence, we see that the contracts are valid for what they are—instruments establishing the terms and conditions of water delivery for a stated 40-year period. They do not prescribe what will happen after the 40-year period ends because that subject is not within the scope of their coverage. In any event, federal law has been amended since these contracts were entered into to afford statutory assurance of continued water service upon terms and conditions mutually satisfactory to the federal government and the contracting district. As a result, possible constitutional objections to the right of the United States to discontinue water delivery against the will of the water users are academic and irrelevant.

V. THE PROVISION OF THE CONTRACTS RESPECTING TITLE TO WORKS IS VALID.

The Ivanhoe and Madera contracts each contain the following provision reserving title to all project works in the United States until otherwise provided by Congress (Ivanhoe contract: Art. 33, R. 36; Madera contract: Art. 27, R. 212):

> "Title to all of the Project works, including the distribution system constructed by the United States pursuant to this contract, shall be and remain in the name of the United States until otherwise provided for by the Congress, notwithstanding the transfer hereafter of any of such works to the District for operation and maintenance."

There is no such provision in the Santa Barbara contracts, master or member unit, which are contracts for water service only. The provision, however, does appear in the Goleta, Summerland and Carpenteria distribution system contracts which have been validated by final judgments not appealed.

The majority of the California Supreme Court has held that this provision of the contracts is invalid as a matter of federal law on the basis of the following reasoning:

1. Under federal law, the relationship between the contracting district and the United States is one of "debtor and creditor" (47 Cal.2d 631, 639-640, 648, 306 P.2d 844, 849, 854, AJS 39, 52, 63).

2. One of the incidents of this debtor-creditor relationship is that upon repayment "the district would

succeed to whatever title to lands, structures or works acquired by the United States within the district in aid of its activities on behalf of the district and the landowners within the district, in like manner and to the same extent as an ordinary debtor is entitled to satisfaction of record evidencing the payment of his indebtedness" (47 Cal.2d 631, 306 P.2d 844, AJS 39).

3. Conversely, "the right and obligation of the United States would seem to be to hold the property thus acquired by it in its own name only until final repayment is made, with the right of the district to a conveyance thereof not dependent on a future and necessarily discretionary act of Congress" (47 Cal.2d 631, 306 P.2d 844, AJS 39-40).

4. Since the contract provision quoted above provides for retention of title by the United States until Congress provides otherwise, "obviously such a provision in the agreement is contrary to the debtor-creditor relationship existing between the United States and the district" (47 Cal.2d 631, 306 P.2d 844, AJS 39).

The key determination in the foregoing line of reasoning is that one of the incidents of the "debtor-creditor" relationship established by federal law is the right of the debtor, the contracting district, to a conveyance of title to the facilities serving it after it has paid its share of the construction costs. However, the California Supreme Court majority failed to cite any federal statute, regulation, or court decision where this is provided. The reason is that there is none. The

only statute of which we are aware that does mention the subject of title to project works (section 6 of the Reclamation Act of 1902 (32 Stat. 389, 43 U.S.C. § 498)), supports rather than contradicts the provision in the contracts that Congressional action is required to transfer title. As stated by Chief Justice Gibson of the California Supreme Court, dissenting in *Ivanhoe* (47 Cal.2d 662, 306 P.2d 864, AJS 85-86):

> "There is no reason why the parties cannot agree that title to the project works shall remain in the United States after repayment of construction costs. The provision is a reasonable method of assuring that the various properties of the project shall remain devoted to the purposes for which the federal funds were expended, and, in the absence of a showing that the provision violates the Constitution, or a statute or some rule of policy, we should not hold it to be invalid. There is nothing in the contract or in the reclamation law which precludes Congress from transferring title to project property to the district after all terms of the contract are performed, and it will be up to the district to press its claim thereto at such a time."

In recognition of the fact that federal law does not now authorize the transfer of title to federal irrigation works to the water users, bills have been introduced in the last two sessions of Congress to permit transfers under certain conditions.

In the 84th Congress, S. 2217 was passed by the Senate on July 2, 1956, but was not acted upon by the House of Representatives prior to the termination

of that Congress. In its favorable report on the bill, the Senate Committee on Interior and Insular Affairs explained it as follows (S.Rep. No. 2379, 84th Cong., 2d Sess. 2 (1956)):

> "S.2217 proposes to authorize the Secretary of the Interior to transfer title to distribution systems of Federal reclamation projects under certain circumstances to local water users' organizations upon two conditions: (a) that an organization representing the water users concerned shall have requested the transfer; and (b) that the Secretary shall find that the water users or the organization have completed repayment of all construction and other charges, with the exception of operation and maintenance charges not yet due, which are obligations with respect to the distribution system concerned. *Under existing Reclamation law, no provision is made for the transfer of title to distribution works upon completion of repayment from the United States to any organization.*
>
> "Where two or more water-user organizations are concerned with a distribution system the transfer may be effected by the Secretary on the joint application of the organizations affected.
>
> "The bill avoids any reference to the transfer of dams or other supply works as distinguished from irrigation distribution systems. The reason for this omission is that the question of transfer of dams or headworks involves considerations of national policy, as well as interstate considerations and should be taken up in connection with matters of broad national policy affecting water resources and their use." (Emphasis added).

In the first session of the 85th Congress on May 16, 1957, an identical bill, S. 413, was again passed by the Senate. It is now pending before the House of Representatives for consideration during the second session. A similar explanation of this bill was given by the Senate Committee on Interior and Insular Affairs in its favorable report thereon (S. Rep. No. 291, 85th Cong., 1st Sess. 2 (1957)).

Thus it is clear that while there may be persuasive reasons for transferring title of irrigation works from the federal government to the water users when they have completed payment of their construction obligation, transfer is a policy matter demanding Congressional action. Although Congress is now considering a change in present law, that change has not yet been made. The challenged provision of the contracts is, hence, merely a restatement of what federal law requires in any event.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgments of the Supreme Court of California should be reversed.

Dated: February 26, 1958.

Respectfully submitted,

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(Appendices Follow.)